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IN THE

Supreme Court of the United States

THOMAS PAPPAS,

Petitioner,

—v.—

RUDOLPH GIULIANI, Mayor of the City of New York; HOWARD SAFIR, Commissioner of the Police Department of the City of New York; and the CITY OF NEW YORK,

Respondents.

ON PETITION FOR A WRIT OF *CERTIORARI*
TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF *CERTIORARI*

Of Counsel:

Rosemary Carroll
Alan Friess
CARROLL & FRIESS
20 Thomas Street
New York, New York 10007
(212) 608-0500

Christopher T. Dunn
Counsel of Record
Arthur N. Eisenberg
NEW YORK CIVIL LIBERTIES
UNION FOUNDATION
125 Broad Street, 17th Floor
New York, New York 10004
(212) 344-3005

Counsel for Petitioner

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QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Second Circuit erred in holding that the diminished First Amendment protections accorded to public employees pursuant to *Pickering v. Board of Education*, 391 U.S. 563 (1968), and its progeny apply to private and anonymous expressive activity by public employees?

2. Whether the United States Court of Appeals for the Second Circuit erred in holding that, pursuant to *Pickering v. Board of Education*, 391 U.S. 563 (1968), and its progeny, a public employee can be dismissed for engaging in private and anonymous expressive activity that takes place away from the workplace and that is unrelated to the workplace because of anticipated public reaction to the content of the expressive activity?

INTERESTED PARTIES AND CORPORATE DISCLOSURE STATEMENT

The parties to this appeal are individuals and a municipality. Because no corporations are involved in this matter, there are no parent companies and no subsidiaries to list.

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No. 02-_____

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THOMAS PAPPAS,

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RUDOLPH GIULIANI, Mayor of the City of New York; HOWARD SAFIR, Commissioner of the Police Department of New York City; and the CITY OF NEW YORK,

Respondents.

PETITION FOR A WRIT OF *CERTIORARI*

Petitioner respectfully requests that a writ of *certiorari* issue to review the judgment and opinion entered in this case by the United States Court of Appeals for the Second Circuit on May 13, 2002.

OPINIONS BELOW

The opinion of the Court of Appeals that is the subject of this writ is reported at 290 F.3d 143 (2d Cir. 2002) and is set out in the appendix to this petition at A1-29. The original District Court opinion is published at 118 F.Supp.2d 433 (S.D.N.Y. 2000) and is set out in the appendix at A30-56.

JURISDICTION

This is a petition for a writ of *certiorari* from an opinion and judgment of the United States Court of Appeals for the Second Circuit entered on May 13, 2002. That court denied a petition for rehearing and rehearing *en banc* on November 13, 2002. A57-58. On January 31, 2003, Justice Ginsburg extended the deadline for the filing of this petition to and including March 28, 2003. A59-60. This Court has jurisdiction pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS INVOLVED IN THE CASE

The pertinent provisions of the United States Constitution involved in this case are found in the First Amendment, which provides as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

This case arises from the dismissal of a New York City Police Officer for anonymously mailing from his home on Long Island legally protected but racially offensive materials to political and other organizations that had solicited him seeking financial contributions. After the New York City Police Department (NYPD) conducted a "sting operation" and identified the petitioner as an NYPD employee and as the person mailing the materials, it initiated disciplinary proceedings against him and fired him for the mailings.

The facts relevant to this petition are relatively straightforward and are undisputed. The petitioner Thomas Pappas resides in Long Island, serves as the chairman of the conservative Populist Party for the Town of North Hempstead, belongs to various right-wing organizations, and subscribes to certain supremacist publications. Starting in 1996, Mr. Pappas, in response to solicitations he was receiving at his home from various organizations, started mailing back to those organizations in their solicitation-reply envelopes certain materials. Those materials included material he had taken from publications, including supremacist ones to which he subscribed, and some of the materials he mailed were undisputably racist and repugnant. In all instances Mr. Pappas's mailings were entirely anonymous and contained no information about his name, address, or occupation. *See Pappas v. Giuliani*, 290 F.3d 143, 144-45 (2d Cir. 2002) (A3); *Pappas v. Giuliani*, 118 F.Supp.2d 433, 435-36 & n.2 (S.D.N.Y. 2000) (A31-32).

One organization to which Mr. Pappas sent these materials was the Mineola Auxiliary Police Department, which

was able to prompt the Nassau County Police Department and then the New York City Police Department to conduct "sting" operations by which they sent specially coded solicitations to Mr. Pappas that appeared to be from the NAACP Legal Defense and Educational Fund. When Mr. Pappas anonymously replied to those coded mailings, the NYPD was able to identify him as the one sending the offensive material. *See Pappas*, 118 F.Supp.2d at 435-36 (A31-32); *Pappas*, 290 F.3d at 145 (A3-4).

The NYPD also learned that Mr. Pappas was a Department employee. In fact since 1987 he had worked in the Department's Management Information Systems Division as a civilian-clothed computer operator, a position in which he had no contact with the public. *See Pappas*, 118 F.Supp.2d at 435 (A31); *Pappas*, 290 F.3d at 144 (A3).

Though it has never been suggested that Mr. Pappas engaged in unlawful activity, in the spring of 1998 the NYPD served him with formal disciplinary charges and moved to fire him from his job for mailing the offensive materials from his home. *See* 290 F.3d at 145 (A4). The only evidence introduced in conjunction with the disciplinary proceedings that bore on any impact attributable to the mailings were stipulations that the mailings and the subsequent investigation had been the subject of news reports. *See id.* (identifying news reports).

On the basis of this record, the NYPD fired Mr. Pappas from his position. He then brought suit in the Southern District of New York, alleging that his dismissal violated his First Amendment rights. The District Court granted summary judgment to the defendants in October 2000. *See* 118 F.Supp.2d 433 (S.D.N.Y. 2000) (A30-56).

Mr. Pappas appealed to the Court of Appeals, and on May 13, 2002, a divided panel of the Second Circuit affirmed the District Court's judgment. Writing on behalf of himself and a District Court judge sitting by designation, Second Circuit Judge Pierre Leval applied the standards emanating from *Pickering v. Board of Education*, 391 U.S. 563 (1968), and its progeny and concluded that the NYPD's interest in maintaining positive community relations justified dismissal of Mr. Pappas for his private, expressive activity. *See* 290 F.3d at 145-48 (A5-9).

Circuit Judge Sonia Sotomayor forcefully dissented in an opinion that started with the observation that "[t]oday the Court enters unchartered territory in our First Amendment jurisprudence." 290 F.3d at 154 (A20). Judge Sotomayor summarized her concerns as follows:

> The Court holds that the government does not violate the First Amendment when it fires a police department employee for racially inflammatory speech--where the speech consists of mailings in which the employee did not identify himself, let alone connect himself to the police department; where the speech occurred away from the office and on the employee's own time; where the employee's position involved no policymaking authority or public contact; where there is virtually no evidence of workplace disruption resulting directly from the speech; and where it ultimately required the investigatory resources of two police departments to bring the speech to the attention of the community. Precedent requires us to

> consider these factors as we apply the *Pickering* balancing test, and each counsels against granting summary judgment in favor of the police department employer. To be sure, I find the speech in this case patently offensive, hateful, and insulting. The Court should not, however, gloss over three decades of jurisprudence and the centrality of First Amendment freedoms in our lives because it is confronted with speech it does not like and because a government employer fears a potential public response that it alone precipitated.

Id. (A20).

On May 28, 2002, Mr. Pappas filed a petition for rehearing *en banc*, which the Second Circuit denied on November 13, 2002. *See* A57-58. He now seeks a writ of *certiorari* from this Court of the Second Circuit's May 13, 2002, decision and order affirming summary judgment in this matter.

REASONS FOR GRANTING THE WRIT

This petition presents significant and unresolved questions about the First Amendment rights of public employees to engage in private expressive activity unrelated to the workplace. In this case the Second Circuit held that a public employee could be fired for anonymously using the mail to disseminate fully protected materials, a ruling that is significant by itself but also one that implicates the rights of public employees to engage in a whole range of similarly private and constitutionally protected activity, such as use of the mails to receive materials, the rental of books or movies, use of the Internet, membership in organizations, and even conversations in the privacy of one's home. This Court has never directly addressed the issues presented by this petition, and the Second Circuit decision in this matter creates a split between that Circuit and the Fourth and Tenth Circuits.

The first question presented by this petition concerns the applicability of the diminished First Amendment protections afforded to public employees and emanating from this Court's seminal decision in *Pickering v. Board of Education*. This Court's contemporary public-employee, free-speech jurisprudence has held that public employees have considerably reduced free-speech rights, but all of the Court's *Pickering* decisions have concerned speech that took place in the workplace or that involved the workplace. *See Pickering v. Board of Education*, 391 U.S. 563 (1968) (addressing dismissal of school teacher who published letter in newspaper about school district finances); *Givhan v. Western Line Consolidated School District*, 439 U.S. 410 (1979) (addressing dismissal of teacher for making statements to principal about school district

policies); *Connick v. Myers*, 461 U.S. 138 (1983) (addressing dismissal of assistant district attorney who distributed survey in office); *Rankin v. McPherson*, 483 U.S. 378 (1987) (addressing dismissal of sheriff's employee who endorsed assassination of President in statement to fellow employee in office); *Waters v. Churchill*, 511 U.S. 661 (1994) (plurality opinion) (addressing dismissal of employee for making disparaging statements to prospective employee about workplace).

By contrast, this case -- arising out of the petitioner's anonymous mailing of lawful materials from his home -- involves speech that neither took place in the workplace nor concerned the workplace. This Court has never suggested that the *Pickering* doctrine extends to such speech, and four members expressed the contrary view in *Connick*: "When public employees engage in expression unrelated to their employment while away from the workplace, their First Amendment rights, of course, are no different from those of the general public." 461 U.S. at 157 (Brennan, Marshall, Blackmun, and Stevens, J.J., dissenting). Consistent with this, the majority in *Connick* cautioned that even speech that took place in the workplace might be subject to different standards if undertaken on the "employee's own time" and in "nonwork areas of the office." *Id.* at 153 n.13 (majority opinion) ("Employee speech which transpires entirely on the employee's own time, and in nonwork areas of the office, bring different factors into the Pickering calculus, and might lead to a different conclusion.").

If the anonymous dissemination through the mail of lawful materials unrelated to an employee's work or workplace is subject to the reduced protections of *Pickering*, so too would use of the mail to receive such materials -- whether in the form

of magazines, books, or videos. Moreover, other private expressive activity, such as sending or receiving e-mail, visiting Web sites, joining organizations, or even expressing views in the privacy of the home, all would be implicated. The application of the *Pickering* doctrine to such private expressive activity wholly unrelated to the workplace would mark a dangerous and unprecedented dilution of the First Amendment rights of individuals who happen to work for the government.

The second significant question presented by this petition concerns the extent to which, even under the *Pickering* doctrine, a public employer can invoke a concern about potential public reaction to the content of controversial, private expressive activity unrelated to the workplace to justify dismissing a public employee. While this Court has indicated that a concern for potential (as opposed to actual) disruption to the employer's workplace may be an appropriate basis for disciplining a public employee, it has never suggested that potential disruption is sufficient when it involves nothing more than feared public reaction to the content of the speech. Yet the Second Circuit squarely relied on such anticipated reaction as a basis for upholding the petitioner's dismissal.

Invoking this Court's rejection of a "heckler's veto" in other types of First Amendment controversies, the Fourth and Tenth Circuits have rejected the proposition that community reaction to off-duty speech unrelated to the workplace can justify dismissal of police officers. In a case involving a challenge to the disciplining of a Baltimore police officer whose public performances in blackface prompted demonstrations, the Fourth Circuit held that "threatened disruption by [offended segments of the public] reacting to public employee speech may not be allowed to serve as

justification for public employer disciplinary action directed at that speech." *Berger v. Battaglia*, 779 F.2d 992, 1001 (4th Cir. 1985), *cert. denied*, 476 U.S. 1158 (1986). Similarly, the Tenth Circuit, in a case involving a challenge to the disciplining of police officers for operating a video store that rented sexually explicit material, held that the police department "cannot justify disciplinary action against plaintiffs simply because some members of the public find plaintiffs' speech offensive and for that reason may not cooperate with law enforcement officers in the future." *See Flanagan v. Munger*, 890 F.2d 1557, 1566 (10th Cir. 1989).

Expansion of the *Pickering* doctrine to allow public employees to be fired for possible public reaction to the content of their off-duty, nonworkplace speech would afford public employers virtually unbridled discretion to dismiss employees for engaging in controversial expressive activity in their private lives. Because this would eviscerate the First Amendment rights of public employees and because of the split in the Circuits on this matter, this issue also warrants review by the Court.

I. THE SECOND CIRCUIT'S APPLICATION OF THE DIMINISHED FIRST AMENDMENT RIGHTS UNDER *PICKERING v. BOARD OF EDUCATION* TO PRIVATE AND ANONYMOUS EXPRESSIVE ACTIVITY UNRELATED TO THE WORKPLACE PRESENTS IMPORTANT AND UNRESOLVED QUESTIONS OF FIRST AMENDMENT LAW THAT THIS COURT SHOULD ADDRESS.

In *Pickering v. Board of Education* and its progeny this Court has held that in certain circumstances the First Amendment rights of public employees are significantly diminished as compared to those of persons not employed by the government. In the opinion from which the petitioner seeks a writ of *certiorari*, the Second Circuit took the unprecedented step of extending the *Pickering* doctrine to anonymous and private expressive activity unrelated to a public employee's work or workplace.

The decision by the Court of Appeals marks a dramatic and unwarranted expansion of the *Pickering* doctrine and a correspondingly dramatic and unwarranted reduction in the First Amendment rights of public employees. Given this, this Court should grant a writ of *certiorari* to determine the appropriate First Amendment protections accorded to public employees who engage in private and constitutionally protected expressive activity unrelated to their workplace.

A. The First Amendment Right to Engage in Private and Anonymous Expressive Activity Is Well-Established.

Though it was not disputed below -- indeed, it was not even discussed -- it is important to note at the outset that this Court long has recognized that the First Amendment protects the use of the mails to disseminate controversial materials. In addition, it recognized nearly fifty years ago in the so-called loyalty-oath cases that the First Amendment protects the right of public employees to engage in controversial, private expressive activity

Mr. Pappas' mailing of nonobscene, nonthreatening political materials, whether controversial or offensive, plainly was core expressive activity protected by the First Amendment. *See, e.g.*, *Lamont v Postmaster General of the United States*, 381 U.S. 301, 305-06 (1965) (discussing First Amendment issues bearing on restriction on use of mails for "communist political propaganda" and observing that "the use of the mails is almost as much a part of free speech as the right to use our tongues"; internal quotations and citation omitted); *Hannegan v. Esquire, Inc.*, 327 U.S. 146, 151-59 (1946) (construing, in light of First Amendment dictates, federal postal statute to preclude Post Office from denying second class rate to magazine with nonobscene material on basis of concern about objectionable content of magazine).

That Mr. Pappas was an employee of the Police Department alone did not provide the Department with the authority to fire him for his constitutionally protected expression. Nearly fifty years ago the Court renounced the proposition -- aptly captured in Justice Holmes' epigram "[A

policeman] may have a constitutional right to talk politics, but he has no right to be a policeman" -- that public employees have no protections against loss of their government employment when they engage in activity protected by the First Amendment. *See Connick v. Myers*, 461 U.S. 138, 143-44 (1983) (quoting *McAuliffe v. Mayor of New Bedford*, 155 Mass. 216, 220 (1892)).

Rather, the Court held in the highly charged climate of the McCarthy Era that the government has no authority to condition public employment on a person's disavowal of controversial political activities. *See Wieman v. Updegraff*, 344 U.S. 183 (1952) (holding that a state could not require its employees to establish their loyalty by extracting an oath denying past affiliation with Communists); *Cafeteria Workers v. McElroy*, 367 U.S. 886 (1961) (recognizing that government could not deny employment because of previous membership in particular party); *Keyishian v. Board of Regents*, 385 U.S. 589 (1967) (invalidating New York statutes barring employment on the basis of membership in "subversive" organizations), *all discussed in Connick*, 461 U.S. at 144. And in an observation that ties the mail cases to the loyalty-oath cases, the Court in *Lamont* specifically referred to the threat that restrictions on use of the mails for controversial political materials might pose to public employees: "Public officials, like schoolteachers who have no tenure, might think they invite disaster if they read what the Federal Government says contains the seeds of treason." 381 U.S. at 307.

Under these rulings from this Court, public employees plainly have a First Amendment right to associate with controversial political groups, and the government has no power to fire them for this alone. Similarly, they have a right

to use the mails, even when that entails the mailing of controversial political materials. The ruling of the Second Circuit, however, calls into question the validity of the important First Amendment principles established by these cases.

B. Nothing in this Court's *Pickering* Jurisprudence Supports the Second Circuit's Extension of the *Pickering* Doctrine to Anonymous and Private Speech That Is Unrelated to the Workplace and Takes Place Away from the Workplace.

Without mention of this Court's loyalty-oath or mail cases, the Second Circuit affirmed the granting of summary judgment to the NYPD by relying on the exception created by *Pickering v. Board of Education*, 391 U.S. 563 (1968), and its progeny. The Second Circuit's application of the *Pickering* doctrine to anonymous and private expressive activity unrelated to the workplace goes well beyond the rulings of this Court and dangerously diminishes the First Amendment rights of the millions of people who are employed by the government in this country.

As an initial matter, this Court has observed that the *Pickering* doctrine must be read in conjunction with the loyalty-oath cases and creates an exception to those cases. *See Connick*, 461 U.S. at 143-45 (discussing loyalty oath cases and noting that "*Pickering* is rooted" in these cases). Consistent with this, an examination of the *Pickering* cases from this Court reveals the narrow scope of that exception and discloses its inapplicability to this case.

In *Pickering* itself the plaintiff was fired from his

newspaper a letter to the editor identifying himself as a teacher and complaining about various actions taken by school officials. *See* 391 U.S. at 565-66, 575-78 (reproducing text of letter). In considering whether the dismissal violated the First Amendment, the Court first identified the balancing test to be employed in this type of case, a test that required the Court to balance the employee's interest "in commenting on matters of public concern" against the employer's interest "in promoting the efficiency of the public services it performs through its employees." 391 U.S. at 568. Applying this balancing test, the Court held that the dismissal violated the First Amendment, in large part because there was and could be no showing that the speech impaired Mr. Pickering's ability to do his job. *See id.* at 569-73.

Fifteen years later the Court decided *Connick v. Myers*, which involved the dismissal of an Assistant District Attorney who had created a "mini-insurrection" in her office when, in conjunction with her efforts to resist a job transfer, she distributed a survey to fifteen colleagues that asked, among other things, whether the employees "had confidence in and would rely on the word" of various superiors in the office. *See* 461 U.S. at 141. The Court again employed the *Pickering* standard and, after concluding that most of the speech did not touch on a matter of public concern, held that the dismissal did not violate the First Amendment. *See id.* at 146-49.[1]

Next is *Rankin v. McPherson*, which involved the

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[1]The Court did find that one question on the survey touched on a matter of public concern but concluded that concerns about disruption were sufficient to justify the dismissal of the employee. *See id.* at 149-54.

dismissal of an at-will clerical employee of a county constable's office who, in response to news reports of the attempted assassination of then President Reagan, said to a fellow employee at her office, "[I]f they go for him again, I hope they get him." 483 U.S. 378, 380-81 (1987). Invoking the *Pickering* test, the Court concluded that the statement touched on a matter of public concern and held that the dismissal violated the First Amendment because the employer had failed to demonstrate that the speech had impaired or was likely to impair the functioning of the constable's office. *See id.* at 383-92.

Finally, there is the plurality opinion in *Waters v. Churchill*, which involved a First Amendment challenge to the dismissal of a nurse at a public hospital who was overheard making disparaging remarks about her supervisor and about the hospital department in which she worked to another nurse who was considering transferring to that same department. *See* 511 U.S. 661, 664-67 (1994). Though most of its opinion focused on procedural issues not germane to this petition, the plurality employed and reiterated the basic standards set out in *Pickering*, *Connick*, and *Rankin*. *See id.* at 671-75 (part IIB).

The essential point that emerges from these cases is that the Court has endorsed the application of the *Pickering* exception only in cases in which the expressive activity at issue either took place in the workplace (*Connick*, *McPherson*, and *Waters*) or in which the employee was speaking about the workplace and was identified as being a public employee (*Pickering*).[2] The Court has never suggested that *Pickering*

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[2]*See also Givhan v. Western Line Consolidated School* (continued...)

applies to all expressive activity of public employees even if such expression bears no relationship to the employee's work and workplace. Indeed, in *Connick* all the members of the Court strongly suggested to the contrary. *See Connick*, 461 U.S. at 157 (Brennan, Marshall, Blackmun, and Stevens, J.J., dissenting) ("When public employees engage in expression unrelated to their employment while away from the workplace, their First Amendment rights, of course, are no different from those of the general public."); *id.* at 153 n.13 (majority opinion) ("Employee speech that transpires entirely on the employee's own time, and in nonwork areas of the office, bring different factors into the Pickering calculus, and might lead to a different conclusion.").

In this case it is undisputed that the petitioner did nothing other than to mail anonymously from his home constitutionally protected political materials that had nothing to do with the NYPD or with Mr. Pappas's NYPD work. The Court of Appeals ventured well beyond this Court's rulings in applying the *Pickering* doctrine to private and anonymous speech unrelated to the workplace.

The expansion of the reach of the *Pickering* doctrine effected by the Second Circuit's decision has enormous First Amendment consequences for those employed by the

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[2](...continued)
District, 439 U.S. 410 (1979) (addressing dismissal of teacher for making statements to principal about school district policies); *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977) (addressing dismissal of teacher who disclosed to radio station substance of memorandum from principal about school matters).

government. If the anonymous use of the mail is subject to *Pickering*, so too is a range of wholly private activity, such as subscribing to a publication, joining an organization, visiting a Web site, sending an e-mail, or speaking on the phone. Indeed, in each such instance a person necessarily provides more information to the outside world that allows the person to be identified and associated with his or her expressive activity than does the anonymous use of the mail. When subscribing to a publication, one needs to provide at least a mailing address; when joining an organization, one normally supplies a name and address; when sending an e-mail, the recipient and the service provider obtain identifying information; when visiting a Web site, that address remains on one's computer and oftentimes the site itself records the visitor's address; and when speaking on the phone at least one other person hears the conversation, caller-ID devices can record the calling number, and the phone company will have a record.

If the reduced protections of *Pickering* extend to the petitioner's anonymous use of the mail, they presumably extend to all expressive activity by any person who happens to work for the government, no matter how private the expression and no matter how unrelated to the workplace it may be. Such a dilution of the First Amendment rights of public employees is so significant and so unprecedented as to warrant the granting of a writ of *certiorari*.

II. THE SECOND CIRCUIT'S RULING THAT UNDER THE *PICKERING* DOCTRINE A PUBLIC EMPLOYEE CAN BE DISMISSED OUT OF A CONCERN FOR ANTICIPATED PUBLIC REACTION TO THE CONTENT OF ANONYMOUS AND PRIVATE SPEECH UNRELATED TO THE WORKPLACE GOES WELL BEYOND THE RULINGS OF THIS COURT AND CREATES A SPLIT WITH THE FOURTH AND TENTH CIRCUITS.

The second significant issue presented by this petition concerns the extent to which, even if the *Pickering* doctrine applies to off-duty speech unrelated to the workplace, a public employer's asserted concern about anticipated public reaction to the content of such speech can be a basis for disciplining the employee. In this case the Second Circuit relied upon anticipated response to the content of Mr. Pappas's anonymous mailings, with the Court of Appeals asserting that Mr. Pappas' dissemination of materials containing bigoted views "tends to promote the view among New York's citizenry that those are the opinions of New York's police officers." *Pappas v. Giuliani*, 290 F.3d 143, 147 (2nd Cir. 2002) (A7-8). *See also id.* at 149 (A11-12) (discussing issue of "public perception in minority communities that risks harm to the mission of the Police Department").

As is evident from the preceding discussion of this Court's public-employee speech jurisprudence, the Second Circuit's ruling goes well beyond the rulings of this Court in this important area of First Amendment law. In addition, the Second Circuit's ruling creates a direct split in the Circuits.

The Fourth Circuit and the Tenth Circuit have addressed efforts by police departments to invoke the *Pickering* doctrine to justify disciplining police officers who had engaged in controversial, public, off-duty expressive activity that the departments feared would prompt adverse public reaction. Recognizing that this Court has never suggested that the *Pickering* doctrine could be used in this manner, each court rejected this effort and, in so doing, rejected the notion that feared community reaction to the content of controversial police-officer speech could outweigh First Amendment rights in the *Pickering* balancing when applied to off-duty speech unrelated to the workplace. And the Tenth Circuit specifically recognized that to hold otherwise would jeopardize the right of public employees to engage in controversial, private expressive activity unrelated to the workplace.

The Second Circuit's ruling in this matter creates a direct split within the Courts of Appeals on the issue of whether, under the *Pickering* doctrine, feared public reaction to controversial expressive activity unrelated to work or the workplace can overcome the First Amendment interests of persons employed by the government to engage in such expressive activity. The petitioner respectfully submits that the Court should grant a writ of *certiorari* to resolve the split among the Circuits on this important issue.

A. The Fourth Circuit Has Ruled that a Police Department Cannot Rely on Feared Community Reaction to Discipline a Police Officer Who Engaged in Public, Racially Controversial, Expressive Activity.

In *Berger v. Battaglia*, the Fourth Circuit held that the Baltimore Police Department could not order one of its officers to discontinue off-duty public performances in which he impersonated Al Jolsen and, in doing so, appeared in blackface. *See* 779 F.2d 992 (4th Cir. 1985), *cert. denied*, 476 U.S. 1158 (1986). Because the police department had acted in response to demonstrations by members of the Baltimore minority community to what was perceived as the offensive nature of the officer's performances, the Fourth Circuit was forced to address the issue presented by this case: the extent to which public reaction to the content of controversial expressive activity by a public employee can be the basis under the *Pickering* doctrine for disciplining the employee.

At the outset the Court of Appeals observed that a case involving off-duty expressive activity unrelated to a public employee's work or workplace "does not fit too neatly within the paradigmatic factual pattern out of which the '*Pickering* test' has developed." 779 F.2d at 997. Whereas the *Pickering* cases involved balancing speech related to government operations against a public employer's interest "in being able by appropriate disciplinary action to avoid disruption of its internal employment operations," *Berger* concerned balancing expressive activity "wholly unrelated in content to the public employer and its operations" against a threat of "external disruption by third persons reacting to the speech." *Id.*

(emphases added). Though it concluded that these differences did not make *Pickering* irrelevant, the Fourth Circuit concluded that they required striking a very different balance.

The Court of Appeals had little difficulty concluding that the officer's public performances were a form of expressive activity protected by the First Amendment that was entitled to substantial weight in the *Pickering* balancing test. *See* 779 F.2d at 998-1000. It then turned to the District Court's finding as a matter of law that that First Amendment interest was outweighed "by the Police Department's reasonably perceived interests in avoiding future disruptions both of its resources and of its harmonious relationships with the black community." 779 F.2d at 1000.

On this point the Fourth Circuit first observed that "[i]t is at least arguable from *Pickering*, its antecedents, and its progeny, that the only public employer interest that can outweigh a public employee's recognized speech rights is the interest in avoiding direct disruption, by the speech itself, of the public employer's internal operations and employment relationships." *Id.* (citing cases). Assuming, however, that some forms of external disruption might qualify for the *Pickering* balancing test, the court squarely rejected the suggestion that a concern about public reaction to the content of the speech could be a basis for dismissing a public employee:

> Here not only was the perceived threat of disruption only to external operations and relationships, it was caused not by the speech itself but by threatened reaction to it by offended segments of the public. Short of direct incitements to violence by the very content of

> public employee speech (in which case the speech presumably would not be within general first amendment protection), we think this sort of threatened disruption by others reacting to public employee speech simply may not be allowed to serve as justification for public employer disciplinary action directed at that speech.

779 F.3d at 1001. To hold otherwise, reasoned the court, would be to accept a "heckler's veto," which this Court has squarely rejected in other First Amendment cases. *See id.* (citing cases).

B. The Tenth Circuit Has Ruled that a Police Department Cannot Rely on Feared Community Reaction to Discipline Police Officers Who Engaged in Public, Sexually Controversial, Expressive Activity.

In *Flanagan v. Munger*, the Tenth Circuit followed the Fourth Circuit in rejecting efforts by a police department to invoke the *Pickering* doctrine to defend disciplining high-ranking officers who had engaged in controversial off-duty expressive activity unrelated to their work or workplace. *See* 890 F.2d 1557 (10th Cir. 1989). And as did the Fourth Circuit, the Tenth Circuit agreed that a concern for anticipated public reaction to the content of the expressive activity could not justify department action against the officers. Finally, and of particular import to this case, the Tenth Circuit reasoned that to accept the notion that public-employer action could be based on feared community response would mean that the same

concern could be used to discipline employees for engaging in private expressive activity.

The *Flanagan* case arose after the Colorado Springs, Colorado Police Department received complaints that three members of the department owned a video-rental business that included in its rental stock a small number of sexually explicit videos. A subsequent investigation revealed that none of the videos was obscene, but the department ordered the officers to remove the videos from their stock, which the officers did. The local press ran several stories about the officers' involvement in the video business and about the department's investigation, and the department imposed formal discipline on the officers. The officers then sued in District Court, which granted summary judgment to the defendants. *See* 890 F.2d at 1560-61.

Echoing the observation made by the Fourth Circuit in *Berger*, the Tenth Circuit opened its analysis in *Flanagan* by noting that this case was "factually and conceptually different from the typical *Picerking/Connick* fact pattern," as it involved "'speech' which is off the job and unrelated to any internal functioning of the department." 890 F.2d at 1562. Given this difference, the court held at the outset that the "public concern" prong of the *Pickering* test "does not apply when public employee nonverbal protected expression does not occur at work and is not about work." *Id.* at 1564. Rather, the threshold inquiry would simply be whether the activity at issue is "protected expression." *Id.* (internal quotations omitted). The court readily found that distribution of sexually explicit materials was protected by the First Amendment. *See id.* at 1565.

The court then turned to the issue most germane to this petition, namely the appropriate role in the *Pickering* balancing

test of anticipated community reaction to the content of off-duty speech unrelated to workplace. On this point, the police chief had contended that his actions were justified because "if members of the public knew that officers were renting [sexually explicit films], negative public feelings about the distribution of sexually explicit films would erode the public's respect and confidence in the police department." 890 F.2d at 1566.

Like the Fourth Circuit, the Tenth Circuit concluded that such concerns could not be a basis for disciplinary action under the *Pickering* test: "The department cannot justify disciplinary action against plaintiffs simply because some members of the public find plaintiffs' speech offensive and for that reason may not cooperate with law enforcement officers in the future." 890 F.2d at 1566. And as did the Fourth Circuit, the Tenth Circuit noted that to hold otherwise would be to embrace the "heckler's veto" that this Court has rejected. *See id.* at 1566-67.

Finally, the Tenth Circuit reasoned that precluding reliance upon anticipated public reaction to the content of off-duty speech was appropriate because to do otherwise would open the door to dismissal of public employees for engaging in core protected activity in their private lives. For instance, the court noted, "If the public's reaction to an officer's off-duty 'speech' that is not related to work justifies discipline for renting videos to others, that same justification may be used to prevent a police officer's personal use of sexually explicit videos." 890 F.2d at 1567. Similarly, police officers could be fired for "attend[ing] a meeting of a religious or other group to which some members of the public object." *Id.* In conclusion the court observed, "There are strong first amendment values in the free exercise of religion and in the freedom of assembly

which could be severely restricted if the external objectors' justification were allowed to be applied in these cases." *Id.*

C. The Second Circuit's Decision in this Matter Squarely Conflicts with the Rulings of the Fourth and Tenth Circuits.

In conflict with the rulings of the Fourth and Tenth Circuits, the Second Circuit decision at issue here embraces anticipated community reaction to the content of controversial off-duty speech unrelated to the workplace as a basis for dismissal under the *Pickering* doctrine. Indeed, the opinion below goes beyond the rulings of the Fourth and Tenth Circuits in two significant respects.

First, unlike those cases, there was no testimony in this case from any police official (nor was there any other evidence) about anticipated disruption. Rather, what is in the record is a few press accounts -- all of which were generated not by the petitioner but instead by the NYPD, *see* 290 F.3d at 159 (Sotomayor, J., dissenting) (A28-29) -- of the petitioner's activities, and it was the lower courts that spelled out the concerns for potential adverse reaction to the content of the petitioner's speech. As troubling as it would be to allow the dismissal of public employees based on something as speculative and amorphous as an employer's prediction of adverse public reaction, it is even less justifiable to uphold a dismissal in a case in which the employer never voiced any such concerns and where, instead, they are being supplied by the federal courts -- after the fact.

Second, and more significantly, while the expressive activity at issue in *Berger* and *Flanagan* was public, the

expressive activity here was private and anonymous. The officer in *Berger* was performing in public in blackface and the officers in *Flanagan* were operating a public business, but the officer here did nothing more than anonymously mail constitutionally protected materials. The Second Circuit's upholding of his dismissal not only conflicts with the rulings of the Fourth and Tenth Circuit, but it extends beyond them to reach wholly private expressive activity. This extension makes the conflict between the Circuits all the more important to resolve.

CONCLUSION

For the reasons stated above, the petitioner requests that the Court grant a writ of *certiorari* in this matter.

Respectfully submitted,

Christopher T. Dunn
(Counsel of Record)
Arthur N. Eisenberg
New York Civil Liberties
Union Foundation
125 Broad Street
New York, New York 10004
(212) 344-3005

Of Counsel
Rosemary Carroll
Alan Friess
Carroll & Friess
20 Thomas Street
New York, N.Y. 10007
(212) 608-0500

Dated: March 27, 2003
New York, New York

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2001

(Argued November 16, 2001 Decided: May 13, 2002)

Docket No. 00-0487

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THOMAS PAPPAS,

Plaintiff-Appellant,

—v.—

RUDOLPH GIULIANI, Mayor of the City of New York; HOWARD SAFIR, Commissioner of the Police Department of New York City,

Defendants-Appellees.

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BEFORE: LEVAL, SOTOMAYOR, *Circuit Judges*, and McMAHON, *District Judge*.*

Plaintiff Thomas Pappas appeals from a summary judgment of the United States District Court for the Southern District of New York (Buchwald, J.), dismissing his claim that he was terminated from the New York City Police Department in violation of the First Amendment by reason of his exercise of his rights of free speech.

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*The Honorable Colleen McMahon, United States District Court for the Southern District of New York, sitting by designation.

Judge McMahon concurs in this opinion and files a separate concurring opinion. Judge Sotomayor dissents by separate opinion.

AFFIRMED

CHRISTOPHER T. DUNN, Amicus Curiae New York Civil Liberties Union, New York, N.Y. (Arthur Eisenberg on the brief), *for Plaintiff-Appellant*

ROSEMARY CARROLL, Carroll & Friess, New York, N.Y., on the brief *for Plaintiff-Appellant.*

MARGARET KING, for Michael D. Hess, Corporation Counsel of the City of New York, New York, N.Y. (Edward F.X. Hart, Bryan D. Glass, Marta Ross, of counsel), *for Defendants-Appellees.*

LEVAL, J,:

This appeal raises the question whether a municipal police department may, without violating the First Amendment's guarantee of freedom of speech, terminate a police officer by reason of the officer's anonymous dissemination of bigoted racist anti-black and anti-semitic materials. Appellant Thomas Pappas brought this suit under 42 U.S.C. §1983 against officials of the City of New York and the New York City Police Department (NYPD) alleging that he was unconstitutionally fired from his employment by the police department by reason of his exercising rights of free speech protected by the First Amendment. The United States District

Court for the Southern District of New York (Buchwald, J.) granted the defendants' motion for summary judgment. We affirm the district court.

Background

Pappas was employed by the New York City Police Department (NYPD) from January 25, 1982 until his termination on August 18, 1999. At the time of his termination, Pappas worked in the Department's Management Information Systems Division (MISD), which was responsible for maintenance of its computer systems.

On at least two occasions in 1996 and 1997, Pappas received letters from the Mineola Auxiliary Police Department (MAPD) soliciting charitable contributions and enclosing reply envelopes for use in sending contributions. Pappas stuffed the reply envelopes with offensive racially bigoted materials and returned them anonymously. The materials included printed fliers conveying anti-black and anti-semitic messages. The fliers asserted white supremacy, ridiculed black people and their culture, warned against the "Negro wolf ... destroying American civilization with rape, robbery, and murder," and declaimed against "how the Jews control the TV networks and why they should be in the hands of the American public and not the Jews."

Upon receipt of these materials, the Nassau County Police Department then undertook an investigation in the hope of identifying the sender. It sent out a charitable solicitation mailing with coded return envelopes. Once again, a response envelope was returned, stuffed with similar racist materials. The Nassau County Police Department traced the source to P.O. Box 321 in Mineola, New York--a post office box registered under the name "Thomas Pappas/The Populist Party for the Town of North Hempstead." The Nassau County Police Department made another mailing in 1997, with the same result.

Upon ascertaining that Thomas Pappas was a New York City police officer, the Nassau County Police Department notified the New York City Police Department's Internal Affairs Bureau (IAB), which repeated the investigative experiment, sending Pappas further charitable solicitation mailings, once again with the result that Pappas returned the reply envelopes stuffed with similarly provocative materials.

On March 24, 1998, Pappas was interrogated by a New York City police officer. Pappas at first admitted sending such materials to his friends, and, after some evasion, admitted sending the materials in response to the MAPD and other solicitations. The NYPD charged Pappas with violation of a Departmental regulation. A disciplinary trial was held before Josefina Martinez, Assistant Deputy Commissioner of Trials. Pappas asserted at the trial that he had sent the materials because, "I was protesting, and I was tired of being shaken down for money by these so-called charitable organizations. And it was a form of protest, just put stuff back in an envelope and send stuff back as a form of protest." The NYPD and Pappas stipulated that Pappas's conduct and the subsequent investigation had been the subject of news media reports in the *New York Times,* Fox 5 news, ABC News on Channel 7, and a Long Island television station.

Commissioner Martinez issued a 20-page decision, finding Pappas guilty of violating a Departmental Regulation by disseminating defamatory materials through the mails, and recommending his dismissal from the force. Police Commissioner Howard Safir adopted the recommendation and dismissed Pappas.

Pappas then filed this action seeking monetary and injunctive relief, claiming that his termination violated his First Amendment rights. The district court granted the defendant's

motion for summary judgment and dismissed the action.[1] This appeal follows.

Discussion

Where a government employee suing for violation of the First Amendment establishes that he was terminated by reason of his speech "upon a matter of public concern," the Supreme Court has instructed that the court's task is "to arrive at a balance between the interests of the ... citizen, in commenting on matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering v. Board of Education*, 391 U.S. 563 (1968). *See also Connick v. Myers,* 461 U.S. 138 (1983). Under the balancing test, the governmental employer may defeat the claim by demonstrating that it "reasonably believed that the speech would potentially interfere with or disrupt the government's activities, and can persuade the court that the potential disruptiveness was sufficient to outweigh the First Amendment value of that speech." *Heil v. Santoro,* 147 F.3d 103, 109 (2d Cir. 1998) (internal citations omitted).

There is no dispute that Pappas was terminated because of his speech and would not have been terminated were it not for his speech. The defendants contend that Pappas's anonymous sending of the bigoted materials may not be "fairly characterized as constituting speech on a matter of public

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[1]The district court decided that the NYPD's administrative proceedings did not bar Pappas's subsequent §1983 suit under collateral estoppel, but went on to conclude that Pappas could not make out a First Amendment violation. Because we agree with the district court on the First Amendment issue, we do not discuss the questions of preclusion.

concern." *Connick,* 461 U.S. at 146. The First Amendment concerns itself less with speech relating to an individual's private concerns than with speech relating to matters of public concern; accordingly a public employee has greater latitude to discipline an employee over speech expressing private concerns. "When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment." *Id.* at 146. "Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record." *Id.* at 147-48. Because of our resolution of the *Pickering* balancing test, we assume without deciding that Pappas's mailings constituted speech on a matter of public concern.

Pickering's balancing test weighs the plaintiff's interest in freely speaking his mind on a matter of public concern against the State's interest in the performance of its functions. *Pickering,* 391 U.S. at 568. Under our Constitutional doctrines, few values are more carefully and thoroughly protected than the citizen's right to speak his mind on matters of public concern without interference by government. Nonetheless, the right is not absolute. At times, the right of free speech conflicts with other important governmental values, posing the problem which interest should prevail. The effective functioning of entities of government could be seriously undermined by its employees' unrestrained declarations of their views. For this reason, the employee's right of free speech is sometimes subordinated to the interest of the effective functioning of the governmental employer.

The effectiveness of a city's police department depends importantly on the respect and trust of the community and on the perception in the community that it enforces the law fairly, even-handedly, and without bias. *See* Tom R. Tyler, *Why*

People Obey the Law 22-23, 67 (1990) (demonstrating how belief in the legitimacy of legal authority and trust in law enforcement leads to greater compliance with law). If the police department treats a segment of the population of any race, religion, gender, national origin, or sexual preference, etc., with contempt, so that the particular minority comes to regard the police as oppressor rather than protector, respect for law enforcement is eroded and the ability of the police to do its work in that community is impaired. Members of the minority will be less likely to report crimes, to offer testimony as witnesses, and to rely on the police for their protection. When the police make arrests in that community, its members are likely to assume that the arrests are a product of bias, rather than well- founded, protective law enforcement. And the department's ability to recruit and train personnel from that community will be damaged. *See* David Cole, *No Equal Justice* 169-178 (1999) (describing the costs that the perception of inequality and disparate treatment places on law enforcement; it engenders distrust and unwillingness to cooperate and encourages crime), Brandon Garrett, Note, *Standing While Black: Distinguishing Lyons in Racial Profiling Cases,* 100 Colum. L.Rev. 1815, 1833 nn. 72-3 (2000) (describing social science evidence that a public perception of police bias undermines community cooperation with law enforcement and compliance with law), C.J. Chivers, *Alienation is a Partner for Black Officers,* N.Y. Times, April 3, 2001, at A1; Kevin Flynn, *Feeling Scorn on the Beat and Pressure From Above,* N.Y. Times, Dec. 26, 2000, at A1 (describing how negative public perceptions of police in New York, especially by minority communities, has led to low morale, and difficulty in recruitment and retention, especially among minorities).

For a New York City police officer to disseminate leaflets that trumpet bigoted messages expressing hostility to Jews, ridiculing African Americans and attributing to them a criminal disposition to rape, robbery, and murder, tends to promote the view among New York's citizenry that those are

the opinions of New York's police officers. The capacity of such statements to damage the effectiveness of the police department in the community is immense. Such statements also have a great capacity to cause harm within the ranks of the Police Department by promoting resentment, distrust and racial strife between fellow officers. In these circumstances, an individual police officer's right to express his personal opinions must yield to the public good. The restrictions of the First Amendment do not require the New York City Police Department to continue the employment of an officer whose dissemination of such racist messages so risks to harm the Department's performance of its mission. In the words of Justice Holmes, "A policeman may have a constitutional right to [speak his mind], but he has no constitutional right to be a policeman." *McAuliffe v. Mayor of New Bedford,* 155 Mass. 216, 220, 29 N.E. 517, 517 (1892) (quoted in *Connick,* 461 U.S. at 143-44).

Pappas argues that the foregoing considerations should not apply to him because he tried to conceal his identity as the source of the bigoted opinions. He contends he is being punished for his opinions, rather than his actions. The argument misses the mark. Pappas was tried and found to have violated Police Department regulations. That fact is important to our upholding of the lawfulness of the Department's actions. If Pappas had written his bigoted views in a private diary, or revealed them in confidence to his family or intimate friends, and they had become known accidentally, or through a breach of confidence, that case would present different considerations. We do not speculate how such a case would be decided. But those are not the facts we deal with. Here, Pappas deliberately sought to publicize his views. He repeatedly sent leaflets that aggressively pronounced his provocative views to organizations engaged in public solicitation. He admittedly did so with the intention of influencing public opinion. The Department appropriately took action against him not because of his private opinions but because of his conduct in violation of

Departmental regulations--conduct that risked to harm the Department in the performance of its governmental mission. Although Pappas tried to conceal his identity as speaker, he took the risk that the effort would fail.

We turn now to the arguments Judge Sotomayor advances in her dissenting opinion.

* * *

Judge Sotomayor attaches great importance to the fact that Pappas did not occupy a "high level 'supervisory,' 'confidential,' or 'policymaking' role" in the Police Department. She relies on the Supreme Court's statement in *Rankin v. McPherson,* 483 U.S. 378 (1987) that where "an employee serves no confidential, policymaking, or public contact role, the danger to the agency's successful functioning from that employee's private speech is minimal." *Id.* at 390-91, as well as our observation in *McEvoy v. Spencer,* 124 F.3d 92, 103 (2d Cir. 1997) that "the more the employee's job requires confidentiality, policymaking, or public contact, the greater the state's interest in firing her for expression that offends her employer." (internal quotation marks omitted).

While it is undoubtedly the case that ill-considered public statements of a high policy-making executive often have a higher likelihood of harming the employer's accomplishment of its mission than similar statements made by a file clerk, laborer or a janitorial employee, it by no means follows that rank and file employees are incapable of harming the employer's effectiveness by their speech, or that governmental employers are powerless to sanction lower level employees when their statements do have the capacity to harm the employer's performance of its mission. Neither *Rankin* nor *McEvoy* implied any such thing.

In *Rankin,* a clerical employee in the Harris County, Texas, Constable's office, who had no contact with the public, was fired because, upon learning of the assassination attempt on President Reagan, she and a coworker discussed privately their

mutual dislike of the President's welfare cutbacks, and she added, "If they go after him again, I hope they get him." *Id.* at 380. The lower court found that the statement was not a criminal threat, but rather a hyperbolically framed statement of a political opinion concerning the President's policies. "Although [the plaintiff's] job title was deputy constable, this was the case only because all employees of the Constable's office, regardless of job function, were deputy constables. She was not a commissioned peace officer, did not wear a uniform, was not authorized to make arrests or permitted to carry a gun." *Id.* at 380 (internal citations omitted). She was a typist and had no contact with the public. There was "no indication that she would ever ... have any involvement with ... the minimal law enforcement activity engaged in by the Constable's office." *Id.* at 392.

The Court identified as "pertinent considerations [in assessing the employer's legitimate interest in disciplining an employee for speech] whether the statement impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise." *Id.* at 388. "These considerations, and indeed the very nature of the [*Pickering*] balancing test, make apparent that the state interest element of the test focuses on the effective functioning of the public employer's enterprise." *Id.*

The Court easily concluded, considering all the circumstances, that the plaintiff's hyperbolic private utterance of her political opinions did not threaten any of the employer's legitimate interests, and in particular did not "interfere[ ] with the efficient functioning of the [Constable's] office." *Id.* at 389.

This case is significantly different in several respects: (i) Pappas is a police officer, while the *Rankin* plaintiff was a civilian clerical employee; (ii) Pappas disseminated his diatribes publicly while the *Rankin* plaintiff was overheard

speaking privately to a coworker; (iii) Pappas was venting his personal racial bias, while the *Rankin* plaintiff (albeit in foolishly hyperbolic terms) was discussing the governmental policies of the President, *see Connick,* 461 U.S. at 150 ("the State's burden in justifying a particular discharge varies depending upon the nature of the employee's expression."); (iv) furthermore, and most important, upon consideration of all the pertinent facts, while the *Rankin* plaintiff's statement had little or no capacity to harm the effective functioning of the employer, the making of Pappas's statements by a police officer has a very high capacity to impair the effective functioning of the Police Department in the discharge of its public mission and to provoke anger and discord among fellow police officers.

Had the facts of this case conformed to *Rankin* 's in any of these respects, we might well reach the same conclusion as the *Rankin* Court. But *Rankin* certainly did not mean that only high level, policy-making employees may be removed by reason of their speech. To be sure, the Supreme Court observed that "[t]he burden of caution employees bear with respect to the words they speak will vary with the extent of authority and public accountability the employee's role entails." *Rankin,* 483 U.S. at 390. By no means does it follow that an ordinary police officer is immune from disciplinary discharge for public statements that carry a high potential to impair the police department's performance of its mission.

The main consideration in assessing the employer's interest is the capacity of the employee's public speech to harm the effective functioning of the employer's enterprise. The public perception in minority communities that risks to harm the mission of the Police Department is not that the Police Commissioner or his principal deputies are racially biased. It is rather the perception that ordinary cops are biased. An ordinary police officer's distribution of these bigoted hate-filled materials reinforces that perception and thus harms the effectiveness of the Police Department. Furthermore, for police officers of one race to express hatred and scorn for members of

another race obviously fans anger, dissension and racial tensions among officers of different races and thus inflicts harm of a second kind on the Department's performance of its mission.

Judge Sotomayor's second argument is that, because Pappas was assigned to computer work in the Management Systems Information Division rather than to law enforcement contact with the public, his statements had no capacity to impair the Department's effectiveness. If Pappas were not a police officer but rather a civilian employee hired to work on the Department's computers, his case would have greater similarity to *Rankin,* and the capacity of his racist remarks to impair the Department's performance of its mission would be diminished. But Pappas is not a civilian employee. He is a cop. The fact that he was assigned to work on computers does not make him any less a cop, either in fact or in public perception. His assignment furthermore was subject to change; at any time he could have been assigned to a beat. If the press became aware of his dissemination of racist diatribes, it would report that this was done by a police officer--not that it was done by a person employed to work on Police Department computers. Furthermore, as to the capacity of Pappas's statements to cause racial tension and strife *among fellow police officers,* it would make no difference whether he was assigned to patrol a beat or to program computers.

Judge Sotomayor's third point is that Pappas's statements were made from his home, on his own time, and anonymously, in a manner that did not reveal that he was a police officer. Judge Sotomayor cites the Supreme Court's observation in *Connick* that "[e]mployee speech which transpires entirely on the employee's own time, and in non-work areas of the office, [brings] different factors into the *Pickering* calculus, and might lead to a different conclusion." 461 U.S. at 153 n. 13. That observation in *Connick* was made with reference to an employee's complaint about office policies and procedures. It is undoubtedly true that complaints about

office policies made away from the office to persons having no connection with the employment would generally have little capacity to harm the employer. It is also true that Pappas's proclamations of bigotry made privately, away from work, during off-duty time, had a lesser likelihood of undermining the Department's effectiveness than if he had passed out his leaflets in uniform to citizens in the streets of New York or to his fellow officers at the workplace.

But to say that his statements would have had greater likelihood of causing harm if made in uniform or at work does not mean that they did not have a substantial capacity to cause harm as they were made. Where and when the statements are made is certainly a factor to be considered in the overall assessment, but it is only a factor. No talismanic or determinative significance attaches to it. What we must do in such cases is assess the entire picture--especially the likelihood that the employee's speech will harm the functioning of the governmental employer. Given the nature of Pappas's statements and their very high capacity to inflict serious harm on the employer's mission if it were discovered that they came from a police officer, the fact that Pappas acted anonymously, at home, and on his own time does not alter the ultimate conclusion that the Department was entitled to dismiss him because of the harm to the Department that his statements risked to inflict.

Judge Sotomayor's final point is that the Department should not be permitted to discharge Pappas because, absent the Department's decision to bring disciplinary charges, no one would have known that these offensive materials were being distributed by a police officer. Judge Sotomayor argues in essence that, upon learning that Pappas was violating its rules by disseminating bigoted racist materials, the Department should have swept the matter under the rug hoping no one would ever learn the facts; and if it chose instead to bring charges against Pappas, it has only itself to blame for the resulting harm to its reputation, and may not discharge Pappas

for his misconduct. In our view this argument is seriously misguided as a policy matter, and is premised furthermore on a misunderstanding of the law.

First, as to the policy implications, we have little sympathy for the suggestion that the proper course for the Police Department, upon learning that one of its officers was disseminating offensive racially bigoted materials, was to hush the matter up and hope to keep it secret. Had the Department taken this course and the truth had eventually become known, the harm to the Department would have been all the greater because the Department would be perceived as tolerating Pappas's acts and being in passive complicity. While it may be true that the Department could have avoided adverse publicity had it covered up Pappas's misconduct rather than proceeding against him, that does not make it the right thing to do, and the Department did not lose the right, as Judge Sotomayor suggests, to dismiss Pappas for this misconduct merely because the bringing of the disciplinary action brought to public light the fact that it was a police officer who was responsible for the hate mailings.

Judge Sotomayor's argument is also premised on a misunderstanding of the government's burden under *Pickering*. A governmental employer's right to discharge an employee by reason of his speech in matters of public importance does not depend on the employer's having suffered *actual* harm resulting from the speech. The employee's speech must be of such nature that the government employer reasonably believes that it is likely to interfere with the performance of the employer's mission. *See Waters v. Churchill,* 511 U.S. 661, 673-74 (1994) (the government need only "make a substantial showing that the speech is ... likely to be disruptive"); *Connick,* 461 U.S. at 152 ("[W]e do not see the necessity for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action."); *Heil,* 147 F.3d at109 ("the government can prevail if it can show that it reasonably believed that the speech would

potentially interfere with or disrupt the government's activities"); *Jeffries v. Harleston,* 52 F.3d 9, 12-13 (2d Cir. 1995) (rejecting any actual harm requirement, and stating that the proper inquiry is into "potential disruptiveness"). The employer's interest in discharging the employee is demonstrated if the employee's statements create a significant risk of harm, regardless whether that harm actually materializes.

In conclusion, it is indeed possible to imagine changed facts that would make the case against Pappas still stronger. The Department's right to dismiss him would have been even clearer if he were a high ranking policy-maker, or if he had distributed his leaflets to the public while on duty wearing his police uniform. The fact that a stronger case can be imagined does not mean that the actual case for discharge is inadequate. Considering the facts as they are, balancing Pappas's interest in his right to pronounce his views against the interest of the Department as an employer in promoting the efficiency of the public service it performs, *see Pickering,* 391 U.S. at 568; *Connick,* 461 U.S. at 142, we conclude that the Department was entitled to terminate Pappas by reason of his public dissemination of his diatribes.

The Department's reasonable perception of serious likely impairment of its performance of its mission outweighed Pappas's interest in free speech. The district court properly held the Department's action did not violate Pappas's rights under the First Amendment.

Conclusion

The judgment of the district court is affirmed.

McMAHON, *District Judge,* concurring:

I agree with Judge Leval's thoughtful explanation of why the City's decision to fire Appellant did not run afoul of

the *Pickering* doctrine. I write separately, however, because I do not think we need to reach *Pickering*. I agree with the district court that Appellant was engaged in purely private speech.

Whether an employee's speech addresses a matter of public concern must be determined by the "content, form, and context of a given statement, as revealed by the whole record." *Connick v. Myers,* 461 U.S. 138, 147-48 (1983). To fall within the realm of "public concern," an employee's speech must satisfy two criteria. It must relate to a matter of political, social or other concern to the community. And the employee must speak "as a citizen upon matters of public concern," not simply "as an employee upon matters only of personal interest." *Id.* at 147. Context as well as content matters.

The vile speech for which Appellant was disciplined touched on matters of paramount political and social concern in this country. *See, e.g., Connick,* 461 U.S. at 148 n. 8 (noting that the right to protest racial discrimination is of public concern); *Jeffries v. Harleston,* 21 F.3d 1238, 1242 (2d Cir.), *vacated on other grounds,* 513 U.S. 996 (1994) (finding that professor's anti-semitic speech at a festival was public speech). From that proposition, the other members of the panel conclude that it qualifies as public concern speech. But that is not the law. "[S]peaking up on a topic that may be deemed one of public importance does not automatically mean the employee's statements address a matter of public concern as that term is employed in *Connick.*" *Kokkinis v. Ivkovich,* 185 F.3d 840, 844 (7th Cir. 1999). For example, courts in this Circuit and elsewhere have held that complaints of race or gender discrimination--an issue of overwhelming social importance--are not "public concern" speech if they relate only to a personal employment grievance. *Saulpaugh v. Monroe Cmty. Hosp.,* 4 F.3d 134, 143 (2d Cir. 1993) (finding that employee's complaints of sex discrimination did not implicate matters of public concern because they "were motivated by and dealt with her individual employment situation"); *Walker v. New York*

City Transit Auth., No. 99 CIV. 2227(DC), 2001 WL 1098022, at *12 (S.D.N.Y. Sept.19, 2001) (rejecting the argument that all complaints relating to race or gender discrimination implicate matters of public concern); *Nonnenmann v. City of New York*, 174 F.Supp.2d 121, 135-36 (S.D.N.Y. 2001) (finding that police officer's testimony on behalf of a female, black co-worker in discrimination case was not a matter of public concern); *de Silva v. New York City Transit Auth.*, No. CV 96-2758(RJD), 1999 WL 1288683, at *17 (E.D.N.Y. Nov. 17, 1999) (citations omitted) ("an EEOC complaint based on race and sex discrimination is not a matter of public concern, and therefore, is not protected speech under the First Amendment"). *See also Morgan v. Ford*, 6 F.3d 750, 754-55 (11th Cir. 1993) (holding that female employee's complaints of sex harassment were designed to improve her own working conditions, rather than to raise issues of public concern).

Connick itself made the point that not all speech on matters of public significance is "public concern" speech. 461 U.S. at 147-48. The assistant district attorney who was dismissed in that case circulated a survey containing questions about the functioning of the District Attorney's Office that addressed issues of undoubted public importance. Nonetheless, the Supreme Court concluded that the assistant's speech, viewed in its context (she was gathering ammunition for a new round of controversy with her supervisors), did not touch on matters of public concern, but only the employee's personal interest. The *Connick* court looked behind pretextual "public concern" rationale proffered by the disciplined employee in order to discern whether her conduct, *taken as a whole*, was actually meant to address matters of public concern, or was simply a vehicle for furthering her private interests. *Id.*

So, here, must we. As this Court recently recognized, "the court should focus on the motive of the speaker and attempt to determine whether the speech was calculated to redress personal grievances or whether it had a broader public purpose." *Lewis v. Cowen*, 165 F.3d 154, 163-64 (2d Cir. 1999)

(citing *Curtis v. Oklahoma City Pub. Sch. Bd. of Educ.*, 147 F.3d 1200, 1212 (10th Cir. 1998)). The procedure endorsed in *Lewis* is the procedure that Judge Buchwald followed below--reaching, in my opinion, a correct result--and is the procedure we should follow on this appeal.

Nothing in *Locurto v. Safir*, 264 F.3d 154 (2d Cir. 2001), suggests that *Lewis* is no longer good law, or that the context prong of the *Connick* analysis drops out when the speech concerns race relations. In *Locurto*, the police officer and fire fighters were fired for appearing in blackface at a Labor Day parade, on a float that, however tasteless, commented on the effect of integration on the future racial composition of the neighborhood (a phenomenon known as "tipping")--an issue that has been the subject of litigation in this Court.[1] The civic context of the officers' speech on this hot-button topic made its public concern nature so obvious that no one seriously contested it, and this Court proceeded accordingly. *Locurto*, 264 F.3d at 166. Because the "public concern" issue was not litigated in *Locurto*, that case does not help us resolve this one, where the issue is being litigated, and on radically different facts.

The proposition that Pappas engaged in hateful and inflammatory speech to advance a purely private interest can hardly be disputed. Pappas sent several hundred mailings containing this poisonous material anonymously to not-for-profit organizations of all sorts, including a police benevolent society (an error that led to his downfall). The only sin these organizations committed was to ask Pappas for money, and he sent them racist and anti-semitic literature to express his pique at receiving unsolicited mail. While Appellant initially suggested that his mailings were simply a "hobby" with no purpose, *Pappas v. Giuliani*, 118 F.Supp.2d 433, 445 (S.D.N.Y.

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[1] *United States v. Starrett City Assoc.*, 840 F.2d 1096 (2d Cir. 1988).

2000) (citing Tr. of March 24, 1998 interview at 16), he admitted at his disciplinary hearing that the mailings were a form of "protest" against "being shaken down for money by the so-called charitable organizations." *Id.* (citing Trial Tr. at 108-10). Pappas explained that he hoped the mailings would stop the organizations from soliciting him. *Id.* That is a matter of personal interest if ever there was one.

Pappas argues that his membership in certain White Supremacist organizations transforms speech furthering his private interests into public concern speech. But as the district court correctly noted, Pappas' choice of forum is relevant to any assessment of such a claim. *Connick,* 461 U.S. at 148; *Kurtz v. Vickrey,* 855 F.2d 723, 729 (11th Cir. 1988) ("profession of public concern loses force when it is considered that he took no affirmative steps ... to inform the public at large about the problems with which he was so gravely concerned"); *Terrell v. Univ. of Texas Sys. Police,* 792 F.2d 1360, 1362-63 (5th Cir. 1986) (emphasizing the pertinence of failure to make any effort to communicate contents of notebooks to the public in determining whether notebooks contained protected speech). While it is true that speech need not be made in a public forum to qualify as "public concern" speech, *Givhan v. Western Line Consol. Sch. Dist.,* 439 U.S. 410, 414-15 (1979), *Givhan* does not make either the non-public nature of speech or the identity of the audience to which it is directed irrelevant to a private interest/public concern analysis. If it did, all speech by public employees touching on controversial issues, regardless of context, would automatically be speech of "public concern." As we acknowledged in *Lewis,* that is not the case.

Here, Pappas made no effort to forward his "protests" to parties who might profit from knowing about the public's dissatisfaction over unsolicited direct mail fundraising (such as the Better Business Bureau, charitable oversight agencies, IRS, the media, or the public at large). *Pappas,* 118 F.Supp.2d at 445. This belies his effort to cloak his private interest in the garb of "public concern" speech.

The record admits of but one interpretation: Pappas engaged in vile and offensive activity with the sole goal of getting his name excised from direct mail solicitation lists. He so stated when it mattered most--at his disciplinary hearing--and we should take him at his word. His own mouth condemneth him. Because removing his name from mailing lists is a purely personal concern, Pappas was engaged in purely personal speech, even though the words he spoke touched on matters of public importance. I would thus affirm for the reasons stated by the district court in Part B(1) of its opinion.

SOTOMAYOR, *Circuit Judge,* dissenting:

Today the Court enters uncharted territory in our First Amendment jurisprudence. The Court holds that the government does not violate the First Amendment when it fires a police department employee for racially inflammatory speech--where the speech consists of mailings in which the employee did not identify himself, let alone connect himself to the police department; where the speech occurred away from the office and on the employee's own time; where the employee's position involved no policymaking authority or public contact; where there is virtually no evidence of workplace disruption resulting directly from the speech; and where it ultimately required the investigatory resources of two police departments to bring the speech to the attention of the community. Precedent requires us to consider these factors as we apply the *Pickering* balancing test, and each counsels against granting summary judgment in favor of the police department employer. To be sure, I find the speech in this case patently offensive, hateful, and insulting. The Court should not, however, gloss over three decades of jurisprudence and the centrality of First Amendment freedoms in our lives because it is confronted with speech it does not like and because a government employer fears a potential public response that it alone precipitated.

I. Public Concern

As a threshold matter, the majority is correct to assume that the materials at issue in this case constitute speech on a matter of public concern. Issues of race relations are "inherently of public concern." *Connick v. Myers,* 461 U.S. 138, 148 n. 8 (1983); *see also Perry v. McGinnis,* 209 F.3d 597, 608 (6th Cir. 2000) ("In *Connick* ... the Supreme Court clearly established that racial discrimination is inherently a matter of public concern."). And while we are more comfortable when the speech we are protecting involves protestations against racial discrimination, it is not our role to approve or disapprove of the viewpoint advanced.

In *Jeffries v. Harleston,* 21 F.3d 1238, 1242 (2d Cir.), *vacated on other grounds,* 513 U.S. 996 (1994), we were confronted with racial remarks that were "hateful," "repugnant," and clearly inflammatory. The public employee in *Jeffries* had asserted, among other things, that " 'rich Jews' had financed the slave trade" and that Jews had conspired with Mafia figures in Hollywood for the " 'destruction of black people.' " *Id.* at 1242. We found that the comments "unquestionably involved public issues" and were entitled to First Amendment protection. *Id.* at 1245. Pappas's statements in this case about "how the Jews control the TV networks and why they should be in the hands of the American public and not the Jews" are similarly public in nature. As we recognized in *Jeffries,* "First Amendment protection does not hinge on the palatability of the presentation; it extends to all speech on public matters, no matter how vulgar or misguided." 21 F.3d at 1245-46.[1] While the forum in which

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[1]More recently, this Court strongly implied that racial speech, even more purely inflammatory than the speech in *Jeffries* or the instant case, is of "public concern." In *Locurto v. Safir,* 264 F.3d 154 (2d Cir. 2001), members of the New York

(continued...)

Pappas expressed his views was less public than in *Jeffries*--which involved a speech at a festival--that fact does not deprive Pappas's speech of constitutional protection. The Supreme Court addressed this precise issue in *Givhan v. Western Line Consolidated School District,* squarely rejecting the notion "that a public employee forfeits his protection against governmental abridgment of freedom of speech if he decides to express his views privately rather than publicly." 439 U.S. 410, 414 (1979). None of the cases cited by Judge McMahon's concurrence are to the contrary, as they involved employees speaking about issues concerning their *own employment.*[2] This

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[1](...continued)
City Police Department and Fire Department were fired after participating in the presentation of a racist, deeply offensive float at a Labor Day parade in Broad Channel, Queens. The float, entitled "Black to the Future," ridiculed African Americans while referring to the future effects of racial integration in their community. The offensive aspects included the participants' wearing blackface, eating watermelon, and worse. *See id.* at 159. This Court proceeded with its analysis on the assumption that the speech was of public concern, noting that the defendant employers "do not strenuously dispute" that the activity "constituted First Amendment speech on a matter of public concern." *Id.* at 166.

[2]Moreover, Judge McMahon's reliance on *Kurtz v. Vickrey,* 855 F.2d 723 (11th Cir. 1988), for the proposition that public concern value is diminished where an employee "took no affirmative steps ... to inform the public at large about[ ] the problems with which he was so gravely concerned" is misplaced. Judge McMahon neglects to mention that the *Kurtz* court strongly cautioned against placing dispositive weight on this factor because "such a focus overlooks the Court's holding
(continued...)

case involves the categorically different scenario of an employee speaking on issues of race relations entirely unrelated to his job.

II. *Pickering* Balancing Test

Proceeding to the *Pickering* balancing test, the majority finds that the NYPD's interest in fulfilling its mission outweighs Pappas's First Amendment rights under the circumstances of this case. I disagree. I of course do not dispute the majority's premise that a public employee's free speech interest is often subordinated to the effective functioning of a government employer. I also agree that it is appropriate to consider the agency's mission in relation to the nature of the speech, and I appreciate the enormous importance of race relations to the operation of the NYPD. These facts alone, however, do not support the constitutionality of the NYPD's termination of Pappas. The well-established caselaw of the Supreme Court and this Court requires a more searching

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[2](...continued)
in *Givhan* ... that a public employee's freedom of speech is not sacrificed merely because the employee 'arranges to communicate privately with his employer rather than to spread his views before the public.' " *Id.* at 727 (quoting *Givhan,* 439 U.S. at 415-16). Furthermore, the *Kurtz* court found this factor important only with respect to matters that were distinctly employment-related, such as the handling of salary issues at the university where the plaintiff was employed. *See id.* at 728-29. With respect to matters of more public interest, such as the closing of a branch of the university, the court found that the speech was of public concern and therefore protected--notwithstanding the private context of the communication. *See id.* at 729-30.

inquiry.

A court must consider not only the agency's mission in relation to the nature of the speech, but also the employee's responsibilities in relation to that mission. We are not free to disregard this part of the analysis. The Supreme Court has instructed that "in weighing the State's interest in discharging an employee based on any claim that the content of a statement made by the employee somehow undermines the mission of the public employer, some attention *must be paid* to the responsibilities of the employee within the agency." *Rankin v. McPherson,* 483 U.S. 378, 390 (1987) (emphasis added); *see also McEvoy v. Spencer,* 124 F.3d 92, 102- 03 (2d Cir. 1997) (emphasizing this aspect of *Rankin*). As this Court has explained, "the more the employee's job requires confidentiality, policymaking, or public contact, the greater the state's interest in firing her for expression that offends her employer." *McEvoy,* 124 F.3d at 103 (quotation marks omitted) (citing *Caruso v. DeLuca,* 81 F.3d 666, 670 n. 3 (7th Cir. 1996); *Hall v. Ford,* 856 F.2d 255, 261-64 (D.C. Cir. 1988)). The importance of these factors, we have explained, "should not be surprising." *Id.* "Common sense tells us that the expressive activities of a highly placed supervisory, confidential, policymaking, or advisory employee will be more disruptive to the operation of the workplace than similar activity by a low level employee with little authority or discretion." *Id.* (citing *Bates v. Hunt,* 3 F.3d 374, 378 (11th Cir. 1993); *Kinsey v. Salado Indep. Sch. Dist.,* 950 F.2d 988, 994 (5th Cir. 1992)).

We apply this factor in the law enforcement context by asking whether Pappas held some high-level, "supervisory," "confidential," or "policymaking" role within the police department. If, for example, the Police Commissioner or one of his deputies engaged in racist speech, the mission of the NYPD could be seriously undermined and the city's interest in dismissing him would be compelling. We must also ask whether Pappas's role with the NYPD involved "public

contact." A police officer walking the beat, while not exercising broad policymaking authority, is often the representative with whom the public interacts. It is not difficult to see how such an officer who expresses racist views in certain situations could damage the efficient operation of the NYPD. This goes to the heart of the majority's reasoning. The majority explains that, in a city like New York, it is the perceived bias among the police department's rank and file that causes the most problems. *Ante,* at [12]. The truth of this assertion is undeniable, but varies greatly depending on which police employees are involved. This is why the Supreme Court and this Court scrutinize the individual employee's responsibilities with such care. In *Rankin,* the Supreme Court applied this analysis to the law enforcement context and found that "where ... an employee serves no confidential, policymaking, or public contact role, the danger to the agency's successful functioning from that employee's private speech is minimal." *Rankin,* 483 U.S. at 390-91. Examples mentioned by the Court of police employees whose speech would likely implicate this "minimal" governmental interest included "computer operator, electrician, [and] file clerk." *Id.* at 391. Turning to the instant case, it is clear that Pappas's position with the NYPD involved neither the policymaking authority of an executive official nor the public contact of a street cop. He was an internal "computer operator" working for the Management Information Systems Division. *Pappas v. Giuliani,* 118 F.Supp.2d 433, 435 (S.D.N.Y. 2000). While this fact is "not conclusive," our precedents deem it a "very significant" weight on the scales in Pappas's favor as we conduct the *Pickering* balancing test. *McEvoy,* 124 F.3d at 103.

The majority further explains that for a police officer to disseminate racist materials tends to promote the view that New York police officers are racists. According to the Court, "[t]he capacity of such statements to damage the effectiveness of the police department in the community is immense." *Ante,* at [8]. Here again, the majority's observation has an element of undeniable truth but requires refinement. At some level of

abstraction or aggregation, the potential for racist statements to damage the NYPD may indeed be "immense." But that is not how the fact-specific *Pickering* test is applied. The question is how potentially damaging is *this* speech--that is, these leaflets sent by this employee under these particular circumstances. We have stated unambiguously that, in conducting the balancing test, "a court must consider whether *the statement* sought to be protected 'impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationships ... or impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise.'" *Lewis v. Cowen,* 165 F.3d 154, 162 (2d Cir. 1999) (quoting *Rankin,* 483 U.S. at 388, and citing *Connick,* 461 U.S. at 151-52) (emphasis added). To conduct this analysis, we look at the " 'manner, time, and place' in which the speech occurs." *Id.* (citing *Connick,* 461 U.S. at 152). In this case, Pappas engaged in the speech anonymously, on his own time, and through mailings sent from his home. I address these factors in turn.

It is significant that Pappas did not purport to speak for the NYPD. We recently explained that the central reason why "[public employees'] free speech claims are subject to the *Pickering* balancing test" is "the state's significant interest in regulating the expressive conduct of its employees while they are acting on behalf of the state." *Knight v. Conn. Dep't of Pub. Health,* 275 F.3d 156, 167 (2d Cir. 2001). This fact alone does not deprive the government of its legitimate interest in the matter, but its interest is higher with respect to "employees who purport to speak for the government." *Moore v. City of Wynnewood,* 57 F.3d 924, 933 (10th Cir. 1995). The significance of this factor depends upon the presence of another factor, already discussed, regarding the responsibilities of the employee. For example, the fact that the Police Commissioner did not purport to represent the NYPD when making a racist statement would mean little. Where, as here, the employee has no such authority or public contact, this aspect is significant.

Moreover, the facts of this case are particularly compelling in this regard: Not only did Pappas fail to connect himself to the NYPD, his mailings were entirely *anonymous,* making it considerably less likely that the effect of the speech on the NYPD's operations would be "immense."

It is also significant that the speech occurred away from the office on the employee's own time. In *Connick,* the speech at issue was a workplace questionnaire that "touched upon matters of public concern in only a most limited sense" and would be "most accurately characterized as an employee grievance concerning internal office policy." *Connick,* 461 U.S. at 154. Finding the First Amendment concerns virtually non-existent and the countervailing interests compelling, the Supreme Court ruled in the government's favor. *Id.* Notwithstanding the relatively minimal free speech interests at stake, the Court nonetheless cautioned that "[e]mployee speech which transpires entirely on the employee's own time, and in non-work areas of the office, bring different factors into the *Pickering* calculus, and might lead to a different conclusion." *Id.* at 153 n. 13. We adopted this dictum in *Lewis.* 165 F.3d at 162 (stating that "the *Pickering* balance is more likely to favor the government when an employee directly confronts his supervisor with objectionable language than when an employee engages in equivalent speech on his own time and not in front of co- workers") (citing *Connick,* 461 U.S. at 152-53 & n. 13). The fact that speech takes place in private and away from the workplace favors the employee on both sides of the balancing test: First, it reduces the likelihood of disruption. *See Lewis,* 165 F.3d at 162. Second, it enhances the free speech interests at stake because the employee is speaking in his capacity "as the member of the general public he seeks to be." *Pickering v. Board of Educ.,* 391 U.S. 563, 574 (1968). In the instant case, Pappas's speech was as far removed from the workplace as possible. He acted as a private citizen, off-duty, anonymously sending mailings from his own home on matters of public concern unrelated to his job as a computer operator for the

NYPD. Moreover, the speech in this case implicates matters of public concern far more than did the employee questionnaire in *Connick, see supra* Part I, tipping the scales further in Pappas's favor. *See Lewis,* 165 F.3d at 162 ("The more the employee's speech touches on matters of significant public concern, the greater the level of disruption to the government that must be shown.") (citations omitted).

The majority nonetheless maintains that Pappas "deliberately sought to publicize his views," and that "[a]lthough Pappas tried to conceal his identity as speaker, he took the risk that the effort would fail." *Ante,* at [8-9]. Ultimately, the governmental interest that the majority seeks to protect in this case is publicity. The majority's core concern seems to be that, even though Pappas was a low-level employee with no public contact who was speaking privately and anonymously, the possibility remained that the news would get "out into the world" that the NYPD was employing a racist. I agree this is a significant issue, and I do not take it lightly. This Court has made clear that negative publicity affecting the community's faith in government can be a significant factor in the *Pickering* balancing test. *See Lewis,* 165 F.3d at 164-65. And as the majority points out, news of Pappas's speech did in fact reach the local media. This issue, however, requires closer scrutiny.

This case differs from others we have confronted in a critical respect. In the typical public employee speech case where negative publicity is at issue, the government has *reacted* to speech--which others have publicized--in an effort to diffuse some potential disruption. In this case, whatever disruption occurred was the result of the police department's decision to publicize the results of its investigation, which revealed the source of the anonymous mailings. It was, apparently, the NYPD itself that disclosed this information to the media and the public. Thus it is not empty rhetoric when Pappas argues that he was terminated because of his opinions. *Ante,* at [8]. The majority's decision allows a government employer to

launch an investigation, ferret out an employee's views anonymously expressed away from the workplace and unrelated to the employee's job, bring the speech to the attention of the media and the community, hold a public disciplinary hearing, and then terminate the employee because, at that point, the government "reasonably believed that the speech would potentially ... disrupt the government's activities." *Heil v. Santoro,* 147 F.3d 103, 109 (2d Cir. 1998). This is a perversion of our "reasonable belief" standard, and does not give due respect to the First Amendment interests at stake.

CONCLUSION

I recognize that the *Pickering* test affords substantial deference to government employers, particularly in the law enforcement context. The NYPD's concerns about race relations in the community are especially poignant. But there are limits. "At some point, such concerns are so removed from the effective functioning of the public employer that they cannot prevail over the free speech rights of the public employee." *Rankin,* 483 U.S. at 391. The question is on what side of the line does this case fall. By finding that there is no issue of material fact for trial, the majority lays down too broad a rule regarding the government's ability to disqualify an individual from public employment based on the expression of an unpopular viewpoint. While I agree with the majority that no one factor in the *Pickering* test deserves "talismanic or determinative significance," a full application of this multi-factor test to the unique circumstances of this case indicates that summary judgment was inappropriate. I respectfully dissent.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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THOMAS PAPPAS,

Plaintiff,

—v.—

RUDOLPH GIULIANI, Mayor of the City of New York; HOWARD SAFIR, Commissioner of the Police Department of New York City, and the CITY OF NEW YORK,

Defendants

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OPINION AND ORDER

00 Civ. 0320 (NRB)

NAOMI REICE BUCHWALD
UNITED STATES DISTRICT JUDGE

Plaintiff Thomas Pappas ("Pappas"), a former police officer for Police Department of the City of New York (the "NYPD" and the "City," respectively), has brought this action for monetary and injunctive relief, pursuant to 42 U.S.C. § 1983 ("§1983"), alleging that defendants Rudolph Giuliani, the City's Mayor, Howard Safir, former Commissioner of the NYPD, and the City terminated his employment in violation of his First Amendment rights. Now pending is defendants' motion, pursuant to Fed.R.Civ.P. 56, for summary judgment on the grounds that: (1) plaintiff is precluded from relitigating the same facts and issues he unsuccessfully raised in a prior administrative hearing; (2) plaintiff's actions did not constitute protected speech under the First Amendment; and (3) the named defendants lacked the requisite personal involvement in plaintiff's termination, or otherwise are entitled to qualified

immunity. For the reasons stated below, defendants' motion is granted and plaintiff's complaint is dismissed.

FACTS

Plaintiff was employed by the NYPD from January 25, 1982 until his termination on August 18, 1999.[1] He spent five years as a patrol officer before he was transferred to the Management Information Systems Division (MISD) where he worked as a civilian-clothed computer operator. In his MISD employment, he had no direct contact with the public, although he testified that he could have been reassigned to patrol duty at any time.

Off-duty, plaintiff was a member and the chairman since 1987 of the Populist Party of the Town of North Hempstead. The Populist Party advocated, *inter alia,* repeal of the Federal Income Tax, dismantling the Internal Revenue Service, and ending free trade. Plaintiff also reported being a member of the Liberty Lobby and a subscriber to The National Association for the Advancement of White People (NAAWP), The Resistance published by the National Socialist White People's Party (NSWPP), The Spotlight, the National Educator, and Truth at Last.

On at least two occasions in 1996 and 1997, plaintiff, then a police officer with the NYPD, mailed certain written materials to the Mineola Auxiliary Police Department (MAPD)

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[1]Unless otherwise noted, facts are drawn from the plaintiff's testimony and the undisputed exhibits introduced during plaintiff's February 22, 1999 disciplinary hearing before Commissioner Josefina Martinez and plaintiff's testimony during his March 24, 1998 interrogation by Detective Nowack of Internal Affairs.

in response to the MAPD's solicitation campaign.[2] The materials consisted of various articles and cartoons which the MAPD considered "offensive" antisemitic and anti-black hate mail.[3] The NYPD Internal Affairs Bureau launched an investigation in which it sent plaintiff a request for donations from a fictional organization named the "NAACP Legal Defense and Educational Fund." Again, plaintiff returned the reply-envelope with anti-semitic and anti-black literature. Plaintiff admitted to having engaged in approximately 200 such mailings, over the years, in response to solicitations from other organizations.

Plaintiff's conduct and the ensuing investigation attracted media attention. The New York Times covered the story and Channel 12, Fox 5 news, ABC News on Channel 7, and a local Long Island station carried television coverage.

On March 24, 1998, the NYPD's Internal Affairs Bureau questioned plaintiff about the mailings, their contents, and his political beliefs. He readily admitted his involvement in the

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[2]Plaintiff sent the mailings in the return envelope provided by MAPD. The replies bore no return address or indication that plaintiff was a police officer. They were traced back to plaintiff by the Honest Balloting Corporation ("HBC") which was retained by the Nassau County Police Department to investigate the mailings. The HBC sent coded mailings to plaintiff and confirmed that he was the source of the materials.

[3]Under later questioning, plaintiff responded "yes" when asked whether he would classify the materials he mailed as "possibly being inflammatory or defamatory toward other ethnic groups or religious backgrounds or sexual orientation" (March 24, 1998, NYPD Internal Affairs Bureau Interrogation ("IAB") at 15) and "yes," again, when asked whether he "sent out material that could be described as anti-Semitic" (IAB at 23).

mailings, claiming at different points that they were "just a hobby," a protest of the solicitations he had received, and message to the organizations to cease soliciting from him. He maintained, however, and still does, that he did not himself author any of the articles or cartoons mailed.

The New York Police Department charged plaintiff with engaging in prohibited conduct, namely the dissemination of defamatory materials through the mails, in violation of *Patrol Guide* § 104-01, p. 3, ¶ 2(b) ("Prohibited Conduct"). An administrative disciplinary trial was held before Assistant Deputy Commissioner of Trials, Josefina Martinez ("Commissioner Martinez"). At the trial, plaintiff was permitted to testify, call witnesses, introduce exhibits, and to cross-examine any adverse witnesses. He was represented by counsel throughout the proceeding.[4] The NYPD called no witnesses but presented its case through a series of stipulations and exhibits. Plaintiff testified in his own defense and argued, *inter alia,* that his speech was protected by the First Amendment.

Commissioner Martinez rendered her decision on June 25, 1999, finding plaintiff guilty of two counts of prohibited conduct and recommending Pappas' dismissal from the NYPD. In so doing, she considered--and rejected--plaintiff's First Amendment defense, which he now raises as a claim. She found that (1) plaintiff's conduct did not amount to protected speech on a matter of public concern; and alternatively, (2) the potential for disruption in the NYPD outweighed the value of the purported speech.

On August 18, 1999 Commissioner Safir adopted Commissioner Martinez's recommendation and terminated plaintiff's employment.

In January, 2000, without pursuing any further remedies in state court, plaintiff filed this action, claiming that the

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[4]Plaintiff was represented by same counsel as in this action.

NYPD's termination of his employment was unlawfully in retaliation for speech protected under the First Amendment. At the time plaintiff filed this action, his time to challenge the administrative decision in state court through an Article 78 Proceeding had expired.

DISCUSSION

This Court addresses the case on cross-motions for summary judgment. Summary judgment is properly granted " 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to material fact and that the moving party is entitled to judgment as a matter of law.' " *R.B. Ventures, Ltd. v. Shane,* 112 F.3d 54, 57 (2d Cir. 1997) (quoting Fed.R.Civ.P. 56(c)). The Federal Rules of Civil Procedure mandate the entry of summary judgment "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986).

In reviewing the record, we must assess the evidence "in the light most favorable to the non-movant and ... draw all reasonable inferences in his favor." *Delaware & Hudson Ry. Co. v. Consolidated Rail Corp.,* 902 F.2d 174, 177 (2d Cir. 1990). The mere existence, however, of an alleged factual dispute between the parties will not defeat a motion for summary judgment. Rather, the non-moving party must affirmatively set forth facts showing that there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 256 (1986). An issue is "genuine ... if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* at 248 (internal quotation omitted).

A. *Collateral Estoppel*

Defendants first argue that the doctrine of collateral estoppel bars plaintiff's action. Defendants rely on the administrative, disciplinary trial in which Commissioner Martinez decided on the merits the identical First Amendment issue underlying this action. This argument squarely presents the question of whether federal district courts adjudicating §1983 actions should give issue preclusion to unreviewed legal determinations by state administrative bodies.

Collateral estoppel or "issue preclusion"[5] is the procedural doctrine that "once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case." *Allen v. McCurry,* 449 U.S. 90, 94 (1980). Issue preclusion is a tool of judicial efficiency, not substantive review. It "preclude[s] parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions." *Montana v. United States,* 440 U.S. 147, 153-154 (1979).

In principle, issue preclusion can apply to both findings of fact and determinations of law. In *University of Tennessee v. Elliott,* 478 U.S. 788 (1986), the Supreme Court held, as a matter of federal common law, that "when a state agency 'acting

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[5]The Restatement of Judgments now refers to collateral estoppel as "issue preclusion." *See* Restatement (Second) of Judgments § 74 (Tent. draft No. 3, Apr. 15, 1976). This renaming reduced the confusion caused when courts and commentators loosely referred to both claim preclusion (res judicata) and issue preclusion (collateral estoppel) as "res judicata." *Allen,* 449 U.S. at 94.

in a judicial capacity ... resolves *disputed issues of fact* properly before it which the parties have had an adequate opportunity to litigate,' ... federal courts must give the agency's factfinding the same preclusive effect to which it would be entitled in the State's courts" (emphasis added). *Elliott* at 798, *quoting* U.S. v. *Utah Construction & Mining Co.,* 384 U.S. 394, 422 (1966) (internal citations omitted). As the Second Circuit more recently stated, the Supreme Court "expressly found that issue preclusion based on unreviewed state agency [fact] determinations is appropriate in §1983 civil rights actions." *Doe v. Pfrommer,* 148 F.3d 73, 79 (2d Cir. 1998). Thus, assuming Mr. Pappas' disciplinary proceeding comported with the specified issue preclusion requirements under New York law, *see id* (explaining New York's requirements for issue preclusion), Commissioner Martinez's *findings of fact* are preclusive in this action.

However, whether unreviewed administrative *determinations of law* are entitled to issue preclusion in a §1983 action is an issue of first impression in the Second Circuit.[6] *See*

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[6]We surmise that the reason that this issue has not been resolved in the Second Circuit is that virtually all New York administrative decisions that give rise to §1983 claims are initially contested in Article 78 proceedings. Article 78 proceedings provide New York Supreme Court direct review of administrative determinations. *See* N.Y.C.P.L.R. § 7801. Article 78 decisions, in turn, can be appealed to the Appellate Division and the Court of Appeals. Unlike administrative rulings, these determinations constitute state court judgments and are accorded full issue preclusive effect in §1983 actions under the Full Faith & Credit statute. *See* 28 U.S.C. 1738 (1994) ("§ 1738"); *Migra v. Warren City Sch. Dist. Bd. of Educ.,* 465 U.S. 75, 82-83 (1984); *Leather v. Eyck,* 180 F.3d 420, 424 (2d Cir. 1999) ("In a federal 1983 suit, the same

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Doe 148 F.3d at 80 ("Currently, this circuit has not taken a position regarding the split in the circuits as to whether to give preclusive effect to the unreviewed legal determinations of state administrative decisions.") (internal citations omitted); *DeSario v. Thomas,* 139 F.3d 80, 86 (2d Cir. 1998); *Locurto v. Giuliani,* 95 F.Supp.2d 161, 167 (S.D.N.Y. 2000) ("The question in this Circuit [of issue preclusion of unreviewed state administrative determinations of law] is, as yet, undecided.").

The Second Circuit has observed that other Circuits are split on this issue and plaintiff contends that the majority who have considered the question have refused to preclude unreviewed administrative determinations of law. *See DeSario* 139 F.3d at 86 (noting that the Fourth and Eleventh Circuits have not allowed preclusion while the Ninth Circuit has); *Locurto* 95 F.Supp.2d at 167 (reporting that the Third, Fourth, Eighth and Eleventh Circuits have not allowed preclusion, in contrast to the Ninth).

Examining the precedents cited by the plaintiff and referenced in *Doe* and *Locurto,* it is evident that only the Third Circuit has ruled squarely against allowing legal issue preclusion and only the Ninth Circuit has ruled it is allowable. *Compare Edmundson v. Borough of Kennett Square,* 4 F.3d 186, 192-193 (3rd Cir. 1993) ("It is the legal issue, the Commission's constitutional ruling, that we think is beyond the scope of the Elliot holding."), *with Eilrich v. Remas,* 839 F.2d 630, 632-33 (9th Cir. 1988) (upholding issue preclusion of

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[6](...continued)
preclusive effect is given to a previous state court proceeding as would be given to that proceeding in the courts of the State in which the judgment was rendered."). In the instant case, plaintiff failed to bring a Article 78 action within the four month statute of limitations, *see* N.Y.C.P.L.R. § 217(1), confronting this court with an unreviewed administrative decision.

administrative determination on First Amendment issue in §1983 action relating to a police officer's dismissal for insubordinate speech). The other authorities did not squarely address the issue. *See Dionne v. Mayor and City Council of Baltimore,* 40 F.3d 677 (4th Cir. 1994) (only ruled on claim preclusion); *Gjellum v. City of Birmingham,* 829 F.2d 1056 (11th Cir. 1987) (only ruled on claim preclusion); *Peery v. Brakke,* 826 F.2d 740 (8th Cir. 1987) (comments on issue preclusion were dicta). Therefore, it appears that no consensus exists among the Circuits on this issue.

Although the immediate issue is procedural, the rights and protections it implicates are fundamental. Section 1983 has stood since the end of the Civil War for the simple proposition that federal courts should stand ready to vindicate federal rights in the face of state violation. In *Patsy v. Board of Regents,* 457 U.S. 496, 504 (1982), the Supreme Court explained that the 1871 Congress, "intended §1 [precursor to §1983] to 'throw open the doors of the United States courts' to individuals who were threatened with, or who had suffered, the deprivation of constitutional rights, and to provide these individuals immediate access to the federal courts notwithstanding any provision of state law to the contrary" (citation omitted). *See Wyatt v. Cole* 504 U.S. 158, 161 (1992) (O'Connor, J.) ("The purpose of §1983 is to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails"); *Mitchum v. Foster,* 407 U.S. 225, 242 (1972) (*quoting Ex parte Virginia,* 100 U.S. 339, 346 (1880)) ("[t]he very purpose of §1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights--to protect the people from unconstitutional action under color of state law, 'whether that action be executive, legislative, or judicial.' "). In accordance with the wide breadth of §1983's promise, the Supreme Court has liberally construed its availability, refusing to create common law procedural requirements, such as "exhaustion," that would

preclude plaintiffs' access to federal courts. *See Patsy,* 457 U.S. at 503-507.[7]

Although broad, plaintiffs' right to have their §1983 claims considered *de novo* in federal court is not absolute. A plaintiff cannot use §1983 to enjoy the proverbial "second bite at the apple." §1983 provides for causes of action in both state and federal courts, *see Martinez v. California,* 444 U.S. 277, 283-284, n. 7 (1980) (state courts may hear §1983 actions), but not both because 28 U.S.C. §1738[8] dictates that federal courts accord state court final judgments the same issue and claim preclusion they would enjoy in the state's courts. *See Allen,* 449 U.S. at 103-04 (state court final judgments are entitled to *issue* preclusion in federal §1983 actions); *Migra v. Warren City School District Board of Education,* 465 U.S. 75, 81 (1984)(state court final judgments are entitled to *claim* preclusion in federal §1983 actions).

Mr. Pappas' claim is perched precariously on the intersection between these two principles. On the one hand, Mr.

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[7]From the time of §1983's passage, the Supreme Court has ruled that it must be liberally construed to give effect to its remedial purpose. *See Golden State Transit Corp. v. Los Angeles,* 493 U.S. 103, 105 (1989) (The Supreme Court has "repeatedly held that the coverage of [§1983] must be broadly construed."); *Dennis v. Higgins,* 498 U.S. 439, *citing Monell v. Dept. of Social Services of City of New York,* 436 U.S. 658, 684 (1978) (quoting Rep. Shellabarger, Cong.Globe, 42d Cong., 1st Sess., App. 68 (1871)) ("The legislative history of the section also stresses that as a remedial statute, it should be 'liberally and beneficently construed.' ")

[8]"[J]udicial proceedings [of any court of any State] shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State...."

Pappas had an opportunity to bring an Article 78 action after the adverse administrative determination and he failed to do so. Had he sought Article 78 review, he would have enjoyed the protections and full attention of the New York Supreme Court, a court that the Supreme Court has ruled is fully competent to adjudicate constitutional issues. *See id.* Mr. Pappas' §1983 action in the wake of his failure to avail himself of state review appears to be the "second bite at the apple" that Congress and the United States Supreme Court disfavored in *Allen* and *Migra.* On the other hand, Mr. Pappas did not "choose" to bring his First Amendment claim in the state administrative proceeding in any meaningful sense. Faced with losing his job, he was forced to raise his First Amendment issue as a defense in the state administrative proceeding. Section 1983's "non-exhaustion" requirement and Congress' commitment to providing a federal forum for constitutional relief would ring hollow if an individual could be forced to litigate his claim before the very agency (in this case, the police department) he claims violated his constitutional rights.

We begin with the Supreme Court precedent closest to the instant issue, *McDonald v. City of West Branch,* 466 U.S. 284 (1984). In *McDonald,* a police officer brought a federal §1983 action alleging violation of, *inter alia,* his First Amendment free speech rights after he was discharged following arbitration. The Sixth Circuit ruled that the state arbitration finding that the officer's discharge did not violate his First Amendment rights precluded the officer from relitigating the issue in federal district court. The Supreme Court reversed, ruling that the federal common law of preclusion does not apply to an unappealed state arbitration decision in a subsequent federal §1983 action. Justice Brennan, writing for the Court, explained,

> "Because §1983 creates a cause of action, there is, of course, no question that Congress intended it to be judicially enforceable ... [a]nd, although arbitration is well suited to resolving contractual

> disputes ... it cannot provide an adequate substitute for a judicial proceeding in protecting the federal statutory and constitutional rights that §1983 is designed to safeguard. As a result, according preclusive effect to an arbitration award in a subsequent §1983 action would undermine that statute's efficacy in protecting federal rights."

Id. at 290. The instant action is quite similar to *McDonald* insofar as parties in both state arbitration and administrative proceedings enjoy limited procedural safeguards, face tribunals capable of fashioning only limited relief, and appear before decisionmakers who may have limited legal training. The same concerns that convinced the Court not to accord state arbitration findings issue preclusion in *McDonald* counsel against allowing preclusion in the instant case.

Further, it is important to recall that issue preclusion for administrative decisions, as for arbitration, is a matter of federal common law, not congressional or constitutional mandate. *See Elliott,* 478 U.S. at 796-799 (administrative fact preclusion for §1983 is federal common law), *McDonald,* 466 U.S. at 288 ("Because federal courts are not required by statute to give res judicata or collateral estoppel effect to an unappealed arbitration award, any rule of preclusion would necessarily be judicially fashioned."). In defining federal courts' latitude to create common law procedural requirements in the name of judicial efficiency, the Supreme Court has relied heavily on congressional intent.

For example, in *Patsy,* the Supreme Court ruled that §1983's promise to provide individuals a federal opportunity to litigate constitutional claims against States prevailed over the purported advantages of applying a federal common law "exhaustion" requirement. *See Patsy,* 457 U.S. at 503-507, 513-16; *Nussle v. Willette,* 224 F.3d 95, 98 (2d Cir. 2000) (the presumptive rule of non-exhaustion is based in large part on Congress' desire to provide independent federal relief for

constitutional violations). Regardless of their position on the exhaustion issue, the Justices agreed that only congressional intent could give the Supreme Court the authority to override §1983's mandate that the doors to the federal courthouse remain open.[9] *Compare Patsy* 457 U.S. at 513-15 (Marshall, J.) (identifying myriad of potential problems posed by an

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[9]This focus on congressional intent is a consistent theme in the Supreme Court's §1983 jurisprudence. *Patsy* stands in contrast to, but not conflict with, *Allen* where the Court searched for whether there was Congressional intent not to apply preclusion. Justice Stewart, writing for the Court in *Allen,* concluded,

> "There is, in short, no reason to believe that Congress intended to provide a person claiming a federal right an unrestricted opportunity to relitigate an issue already decided in state court simply because the issue arose in a state proceeding in which he would rather have not been engaged in at all."

Allen 449 U.S. at 104. In *Allen,* unlike *Patsy,* the Court faced very strong evidence that Congress intended state court judgments to be given issue preclusion in federal §1983 actions: namely, §1738, the Full Faith and Credit Statute. In light of Congress' specific admonition that federal courts give state court judgments full faith and credit, the rebuttable assumption became that preclusion should be given to state court judgments. Since the Court did not find evidence that Congress specifically intended §1983 to be free from §1738 preclusion, federal common law adopted it. Thus, *Allen* and *Patsy* both support the conclusion that, in the absence of conflicting Congressional intent, §1983 actions should not be subject to federal common law rules that deny plaintiffs' their opportunity to adjudicate their constitutional claims in federal court.

exhaustion requirement), *with Patsy* 457 U.S. at (O'Connor, J., concurring) ("considerations of sound policy suggest that a §1983 plaintiff should be required to exhaust adequate state administrative remedies before filing his complaint ... [however,] in the absence of additional Congressional legislation, exhaustion of administrative remedies is not required in §1983 actions."). The prospective benefits that the Court found outweighed by Congress' intent to open federal courts were substantial, including, "lessen [ing] the perceived burden that §1983 actions impose on federal courts ... further[ing] the goal of comity and improv[ing] federal-state relations ... [and] enabl[ing] the agency, which presumably has expertise in the area at issue, to enlighten the federal court's ultimate decision." *Id.* at 512. Nevertheless, the Court concluded that "policy considerations alone cannot justify judicially imposed exhaustion unless exhaustion is consistent with Congressional intent." *See Id.* at 513.

The Second Circuit explained that "[t]his categorical statement that exhaustion is not required, and this expansive view of the federal role in protecting constitutional rights," was based on the Supreme Court's ruling that §1983 is *supplemental* to state remedies. *DeSario,* 139 F.3d at 86. *See Monroe v. Pape,* 365 U.S. 167, 183 (1961) ("The federal remedy of §1983 is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked.").

The issue of whether to give preclusion to unreviewed administrative determinations of law is governed by the same principle: federal common law procedural hurdles capable of precluding §1983 actions should not be erected without clear evidence of Congressional intent. The very policy arguments expressly rejected in *Patsy*--judicial economy, federal-state comity, agency expertise--are advanced today in support of issue preclusion for unreviewed administrative determinations of law. In the absence of clear Congressional intent to differentiate between exhaustion and preclusion in §1983 actions, those policy arguments still fail.

Congress has made no such distinction despite ample opportunity to do so. In just the past few years, it has given serious consideration to numerous amendments affecting the scope of §1983's application, *see, e.g.,* Private Property Rights Limitation Act of 2000 ("PPRLA"), HR 2372, 106th Cong. (2000), and has enacted constricting legislation such as the Prison Litigation Reform Act of 1995, Pub.L. No. 104-134, §801 *et seq.,* 110 Stat. 1321 (1996)("PLRA") (creating an administrative exhaustion requirement for prisoners seeking to bring certain §1983 claims). Congress has used these amendments to make specific exceptions to §1983's general rules. For example, the PLRA and the proposed PPRLA's created targeted exceptions to *Patsy'* s general §1983's no-exhaustion rule. Throughout these efforts and review, however, Congress has not chosen to permit preclusion. This silence speaks loudly in light of its specific pronouncements on exhaustion.

The Supreme Court's specific language in *Elliott* lends further support to the conclusion that it did not wish to extend issue preclusion to unreviewed administrative determinations of law. Throughout *Elliott,* the Court specifically and repeatedly referred to administrative "factfinding" in explaining the scope of its holding. *See Elliott* 478 U.S. at 797-799; *see also Edmundson,* 4 F.3d at 192 ("Elliot was quite specific, however, in referring consistently throughout the opinion to administrative or agency 'factfinding' "), *Gjellum,* 829 F.2d at 1068 ("the Court in Elliot carefully limited its holding to state agency factfinding."). In contrast, the Court made no reference to "factfinding" in other preclusion opinions such as *Allen,* opting instead for a broader holding in terms of "application of res judicata and collateral estoppel concepts." *Allen,* 449 U.S. at 97.

The distinction is sensible. As the Court noted in *McDonald,* an arbitrator "may not ... have the expertise required to resolve the complex legal questions that arise in §1983 actions." *McDonald,* 466 U.S. at 290. Likewise, this is the case

with state administrative proceedings. Although often highly competent in their designated area of law, administrative decisionmakers generally have neither the training nor the experience to adjudicate complex federal constitutional issues. Indeed, the Second Circuit has recognized courts' unique abilities to adjudicate First Amendment constitutional issues in *Plano v. Baker*, 504 F.2d 595, 599 (2d Cir. 1974), "A second factor leading us to hold that the administrative remedy was inadequate is that the constitutional issues raised by this case, particularly in the First Amendment area, lie within the expertise of courts, not the expertise of administrators."

In contrast, the focused expertise that may handicap administrative decisionmakers in adjudicating constitutional issues outside of their practice likely makes their fact-finding skills in these areas comparable to courts of general jurisdiction. *See, e.g., Plano* 504 F.2d at 599 ("it is no doubt true that the facts as viewed by an administrator's expert eye may provide guidance to a court in reaching constitutional determinations."). Thus, in light of the federal courts' special expertise and responsibility in adjudicating federal constitutional matters, the Supreme Court's distinction between state administrative factfinding and determinations of law in *Elliott* appears both purposeful and practical.

In conclusion, allowing issue preclusion for unreviewed administrative determinations would effectively deny Mr. Pappas his opportunity to have his federal constitutional claims adjudicated in federal court. He did not choose to bring the administrative action; it was brought against him. If he had appealed the adverse decision in an Article 78 proceeding, the New York Supreme Court's ruling would have been entitled to full preclusive effect in Mr. Pappas' §1983 action pursuant to §1738 and *Allen*. Therefore, if we were to hold today that the administrative determinations of law were preclusive, we would in essence be compelling Mr. Pappas to litigate his federal constitutional claims before the very agency he contends violated them. This result is contrary to Supreme Court

teaching. Anticipating this dilemma in *Felder v. Casey,* 487 U.S. 131, 142 (1988), the Supreme Court ruled that "it [is] plain that Congress never intended that those injured by governmental wrongdoers could be required, as a condition of [§1983] recovery, to submit their claims to the government responsible for their injuries." *Felder v. Casey,* 487 U.S. 131, 142 (1988).

Our conclusion that preclusive effect should not be given to legal declarations is supported by the purpose of §1983, Supreme Court precedent, and lack of evidence of Congressional intent. The Supreme Court has made plain that it will not substantially obstruct access to the federal courts for §1983 actions by imposing exhaustion or other common law procedural impediments absent clear Congressional intent. As discussed, despite Congress' focus on §1983 and its addition of an exhaustion requirement in the context of prisoner litigation, Congress has not chosen to otherwise limit §1983's general availability, despite calls to do so.

The argument advanced by defendants is contrary to all these considerations and would seriously curtail the §1983 access to the federal courts bestowed by Congress. As the Court noted in *Patsy,* "The very difficulty of these policy considerations, and Congress' superior institutional competence to pursue this debate, suggest that legislative not judicial solutions are preferable." *Patsy,* 457 U.S. at 515. Accordingly, we will not apply issue preclusion to Commissioner Martinez's determination that Mr. Pappas' speech was not protected by the First Amendment and we now consider his claim on its merits.

B. *First Amendment*

Mr. Pappas contends that he should be granted summary judgment because his dismissal violated his First Amendment right to freedom of speech. Defendants claim that Mr. Pappas' speech was not protected in the context of his dismissal and, therefore, there was no constitutional violation for which they

could be found liable.

The Supreme Court has made clear that a public employee's freedom of speech is circumscribed by the government's legitimate interest in "promoting the efficiency of the public services it performs through its employees." *Pickering v. Board of Education,* 391 U.S. 563, 568 (1968); *see, e.g., Rankin v. McPherson,* 483 U.S. 378, 384 (1987); *Connick v. Myers,* 461 U.S. 138, 142 (1983). A public employee seeking to recover on the ground that he has been disciplined because of his exercise of his First Amendment rights must initially establish: (1) that his speech may be "fairly characterized as constituting speech on a matter of public concern," *Connick v. Myers,* 461 U.S. at 146; *see, e.g., Rankin v. McPherson,* 483 U.S. at 384; and (2) that the speech was "at least a 'substantial' or 'motivating' factor in the adverse action taken by the employer." *White Plains Towing Corp. v. Patterson,* 991 F.2d 1049, 1058 (2d Cir. 1993) (*quoting Mt. Healthy City School District Board of Education v. Doyle,* 429 U.S. 274, 287 (1977)). If the employee makes this showing, the burden shifts to the government employer to justify its disciplinary action in light of the presumption that employees' speech on matters of public concern is protected. The government employer can meet its burden in two ways.

First, the government will prevail if it can show that it reasonably believed that the speech would potentially disrupt the government's activities and that the potential disruption would outweigh the First Amendment value of that speech. *See Waters v. Churchill,* 511 U.S. 661, 673, 677, 681 (1994) (plurality opinion); *Heil v. Santoro,* 147 F.3d 103, 109 (2d Cir. 1998); *Jeffries v. Harleston,* 52 F.3d 9, 13 (2d Cir. 1995), *cert. denied,* 516 U.S. 862 (1995). Second, if there is evidence that the speech was protected, the government employer can still avoid liability if it can show by preponderance of the evidence that it would have undertaken the same disciplinary action even in the absence of the protected speech. *See, e.g., Mt. Healthy City School District Board of Education v. Doyle,* 429 U.S.

274, 287 (1977); *White Plains Towing Corp. v. Patterson,* 991 F.2d at 1059; *see also Lowrance v. Achtyl,* 20 F.3d 529, 535 (2d Cir. 1994) ("in cases in which state action is motivated by both proper and improper reasons, the action may be sustained if it would have been taken even in the absence of the improper reason"). We consider plaintiff's claims in light of these standards.

1. *Public Concern*

In order to prevail, Mr. Pappas must first establish that his conduct amounted to speech on a matter of "public concern." "Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record." *Connick,* 461 U.S. at 147-48. To fall within the realm of the "public concern," an employee's speech must "relat[e] to a [ ] matter of political, social, or other concern to the community." *Connick,* 461 U.S. 138. Consequently, First Amendment protection is unavailable when "a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest." *Id.* at 147.

Connick made clear that courts must look behind pretextual "public concern" rationales proffered by plaintiffs and attempt to discern whether their conduct, taken as a whole, was actually meant to address matters of public concern or was simply a vehicle for furthering private interests.[10] *See Connick,*

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[10]In *Connick,* an assistant district attorney was dismissed for circulating a survey in response to the District Attorney's decision to transfer her. The survey contained "questions pertaining to the confidence and trust that [plaintiff's] coworkers possess[ed] in various supervisors, the level of office morale, and the need for a grievance committee."

(continued...)

461 U.S. at 146-148; *See also, e.g., Kokkinis v. Ivkovich,* 185 F.3d 840, 844 (7th Cir. 1999) ("speaking up on a topic that may be deemed one of public importance does not automatically mean the employee's statements address a matter of public concern as that term is employed in Connick.") [citation omitted] ... Rather, we "must instead delve deeper into the precise content, form, and context of speech that admittedly may be of some interest to the public." (*citing Cliff v. Board of Sch. Comm'rs of City of Indianapolis,* 42 F.3d 403, 410 (7th Cir. 1994)). In scrutinizing "public concern" characterizations, courts have weighed plaintiffs' subjective intent to speak on a matter of "public concern" and their decision about whether to use a public forum. *See, e.g., Connick,* 461 U.S. at 146-148; *Kokkinis v. Ivkovich,* 185 F.3d at 844 (ruling that Court must evaluate the employee's "point" in making the expression to determine whether the expression was of "public concern"); *Morgan v. Ford,* 6 F.3d 750, 754 (11th Cir. 1993) (In determining whether speech is of public interest, "A court may consider the employee's attempts to make the concerns public, along with 'the employee's motivation in speaking.' " [citations omitted]).

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[10](...continued)
Connick, 461 U.S. at 148. Although the Court recognized that the general functioning of District Attorneys' offices is a matter of public concern in the broadest sense, it found that the survey questions were, "mere extensions of [the plaintiff's] dispute over her transfer ... [and that] the focus of [plaintiff's] questions [was] not to evaluate the performance of the office, but to gather ammunition for another round of controversy with her superiors." *Id.* Accordingly, the Court ruled that the survey (with the exception of one question relating to political campaigns) did not concern matters of "public interest" and, therefore, could not provide grounds for First Amendment relief.

Courts have been particularly skeptical in cases where plaintiffs have sought to justify patently hateful and inflammatory speech in terms of "public concern." *See, e.g., Tindle v. Caudell,* 56 F.3d 966 (8th Cir. 1995) (police officer's off-duty donning of a "blackface" costume demeaning to blacks not an expression on a matter of public concern), *Lawrenz v. James,* 852 F.Supp. 986, 992 (M.D.Fla. 1994) (police officer's off-duty wearing of "white power" T-shirt is a matter private interest, not public concern); *Pruitt v. Howard County Sheriff's Dept.,* 96 Md.App. 60, 623 A.2d 696 (1993) (police officers' parody of Hogan's Heros involving Nazi salutes, clicking heels, and utterances in German was a matter of private amusement, not public concern).

In the present case, the question is whether Mr. Pappas' dispatch of several hundred racist mailings in response to solicitations constituted speech on a matter of public concern. Mr. Pappas argues that his mailings address areas of substantial public concern including "race, taxation, religion and historical events such as the Holocaust," Plaintiff's Brief at 17, and that his involvement in political causes involving these issues demonstrates his "public concern" intent. However, his characterization of the issues is misleading and his means of communication belie his purported aim.

The record makes evident that Mr. Pappas intended to convey no message of "public concern" in his mailings to solicitors, he simply wanted to dissuade charities from soliciting money from him by offending them with racist mailings. In his initial interview with police investigators on March 24, 1998, he suggested that his mailings were simply a "hobby" with no purpose. Transcript of March 24, 1998 interview at 16. Later, at his disciplinary hearing, he described his mailings as a form of "protest" against "being shaken down for money by the so-called charitable organizations," Trial Transcript ("Tr.") at 108-110, and explained that he hoped the mailings would stop the organizations from soliciting him. *See* Tr. at 108-110, 115-116, 149-150, 152, 157, 159. Although the

issues of fraudulent charitable solicitations and nonprofit mismanagement could be of public concern, plaintiff's allegation that his conduct amounted to speech on these issues is implausible. By his own admission, his motive was to have his name removed from the mailing lists of solicitors. Alternatively, the mailings could be considered particularly vulgar manifestation of Mr. Pappas' white supremacist "hobby." Under either characterization, his conduct amounted to private interest dressed in public garb and was entitled to no greater First Amendment protection than the assistant district attorney's survey in *Connick.*

Furthermore, although speech need not be public to be protected as a matter of "public concern," *see Givhan v. Western Line Consolidated School District,* 439 U.S. 410 (1979), Mr. Pappas' choice of forum is relevant. *See Connick,* 461 U.S. at 148 (emphasizing the fact that plaintiff made no attempt to inform public of survey topic or results in deciding speech was not of "public concern"); *see also Kurtz v. Vickrey,* 855 F.2d 723, 729 (11th Cir. 1988) ("Kurtz's profession of public concern loses force when it is considered that he took no affirmative steps ... to inform the public at large about, the problems with which he was so gravely concerned."); *Terrell v. University of Tex. Sys. Police,* 792 F.2d 1360, 1362-63 (5th Cir. 1986) (in ruling that holding that notebook contents were not protected speech, court emphasized the fact that appellant "made no effort to communicate the contents of the notebook to the public"). Mr. Pappas made no effort to forward his "protests" to the parties involved in the public debate and who represented the public interest, e.g., the Better Business Bureau, charitable oversight agencies, the IRS, the media, or the public at large. Rather, Mr. Pappas suggests that somehow, by anonymously sending his white supremacist literature to any charity with the misfortune of soliciting a donation from him, he was commenting on perennial matters of public concern such as taxation, political history, race and religion. This claim defies reason and the record. Although the First Amendment's

protection does not turn on the effectiveness of a speaker's media strategy, Mr. Pappas' purported strategy for addressing a matter of public concern is so plainly unreasonable, it belies his claim that addressing matters of "public concern" was ever his intention.

Mr. Pappas' anonymous and random mailings were not directed at, and played no part in, the "uninhibited, robust, and wide-open" debate on public issues that the First Amendment affords its highest protection. *New York Times Co. v. Sullivan,* 376 U.S. 254, 270 (1964). Accordingly, this Court finds that Mr. Pappas' conduct, to the degree it was expressive, did not bear on a matter "public concern" and, therefore, any disciplinary action taken on its account did not violate Mr. Pappas' First Amendment rights.

2. *Pickering Balance Test*

Although our inquiry could end here, we will assume *arguendo* that Mr. Pappas can establish that his conduct amounted to speech of "public concern" and was the basis for his dismissal. Therefore, we next consider whether the police department's interest in maintaining efficiency and collegiality outweighed any First Amendment protection to which Mr Pappas' speech was entitled.

The Second Circuit has formulated a three-part test based on *Waters v. Churchill,* 511 U.S. 661, to determine whether an employee's discharge for speech is constitutional:

> "[A] government can fire an employee for speaking on a matter of public concern if: (1) the employer's prediction of disruption is reasonable; (2) the potential disruptiveness is enough to outweigh the value of the speech; and (3) the employer took action against the employee based on this disruption and not in retaliation for the speech."

Jeffries v. Harleston, 52 F.3d at 13. It is important to note first

that the *Jeffries* test focuses on the *potential* for disruption; the disruption need not occur for the potential to have been reasonably foreseen. *See Jeffries,* 52 F.3d at 13-14; *see also Waters,* 511 U.S. at 673. The reasonableness of a government employer's determination of potential disruption, in turn, is based upon whether the government employer undertook an investigation with the degree of care of a private sector manager would exercise under similar circumstances. *See Waters,* 511 U.S. at 677-78 (government employer should proceed with "the care that a reasonable manager would use before making an employment decision--discharge, suspension, reprimand, or whatever else--of the sort involved in the particular case"). In evaluating a prediction's reasonableness, "substantial weight is accorded the government employer's prediction that given speech has the potential for disruptiveness." *Heil v. Santoro,* 147 U.S. F.3d at 109. This deference is particularly strong in environments, like police departments, where "close working relationships are essential to fulfilling public responsibilities." *Connick,* 461 U.S. at 151-52 (in such situations, "a wide degree of deference to the employer's judgment is appropriate.").

Applying the *Jeffries* test, we first must decide whether the police department's conclusion that "[Pappas'] actions as a whole erode public respect for police officers which is fundamental to the functioning of this organization," was reasonable. Commissioner Martinez's opinion at 19. As a procedural matter, Pappas received more due process than is typically afforded defendants in administrative hearings. He was aided by counsel, testified in his own defense, and had the right to call witnesses, cross-examine adverse witnesses, and submit evidence. His hearing lasted a day and resulted in a 190 page transcript, multiple exhibits, and a well-reasoned 20 page opinion by Commissioner Martinez. Certainly, the police department displayed the prudence that a reasonable private employer would have under similar circumstances. Therefore, mindful of *Connick* and *Heil'* s deference to government

employers' determinations of potential disruption, it is clear that the police department's prediction that Mr. Pappas' conduct would be disruptive was reasonable.

Next, we must determine whether the potential disruption outweighed the First Amendment value of Mr. Pappas' speech. On one side of the scale, we have Mr. Pappas' admittedly racist mailings. Mr. Pappas' racist tracts, sent randomly and anonymously to whichever organizations chanced to send him a mass-mailing solicitation, are at best entitled to a low level of First Amendment protection on the sliding *Pickering* scale. In applying the *Pickering* test, the Supreme Court has held that First Amendment protection is a matter of degree, not kind. *See, e.g., Connick,* 461 U.S. at 152 ("a stronger showing [of potential disruption] may be necessary if the employee's speech more substantially involved matters of public concern.").

On the other side of the scale, is the NYPD's concern about the potential disruption of having a known racist police officer on the force and in the media spotlight. The Supreme Court has long recognized that a police department has a substantial interest in developing "discipline, esprit de corps, and uniformity" within its ranks in order to fulfill its vital responsibility. *Kelley v. Johnson,* 425 U.S. 238, 246 (1976). *See also McMullen v. Carson,* 754 F.2d 936, 939-940 (11th Cir. 1985); *Kannisto v. City and County of San Francisco,* 541 F.2d 841, 843 (9th Cir. 1976); *cf. Janusaitis v. Middlebury Volunteer Fire Department,* 607 F.2d 17, 26 (2d Cir. 1979) (fire department, like police department, has greater than normal government interest in maintaining morale and discipline). This substantial interest, in turn, gives police departments wide latitude in regulating the expressive activities of its officers in order "to promote efficiency, foster loyalty and obedience to superior officers, maintain morale, and instill public confidence in the law enforcement institution." *Gasparinetti v. Kerr,* 568 F.2d 311, 315-16 (3rd Cir. 1977); *see Tindle v. Caudell,* 56 F.3d 966 (8th Cir. 1995); *Gordon v. Town of Hunter,* 1996 WL

77391, at *13 (N.D.N.Y. 1996) ("[A] police department has a more significant interest than the typical government employer in regulating the speech activities of its employees in order to promote efficiency, foster loyalty and obedience to superior officers, maintain morale, and instill public confidence.") (*citing Tyler v. City of Mountain Home, Arkansas,* 72 F.3d 568, 570); *cf. Chappell v. Wallace,* 462 U.S. 296 (1983) (judicial review of military decisions is very limited because of the gravity of the military's mission and the importance of discipline and harmony in the ranks to the mission's success).

In the instant case, the police department had good reason to fear disruption in the force and the communities it served in reaction to Mr. Pappas' conduct. In view of the special latitude the Supreme Court has given police departments to discipline employees in light of the their essential mission, New York's recent problems with minority communities based on perceptions of police racism, the media coverage of Mr. Pappas' story, and the relatively low First Amendment value of Mr. Pappas' "public concern" speech, we find that there is no triable issue of fact concerning whether the potential for disruption outweighed the value of Mr. Pappas' speech.

Addressing *Jeffries'* third prong, there is no evidence that the police department dismissed Mr. Pappas for the content of his expression as opposed to the potential for disruption in the aftermath of its discovery. Commissioner Martinez's opinion explicitly stated, "[Mr. Pappas] is not being punished for his thoughts, for we are all entitled to those whatever their content, but rather, for the fact that, in derogation of his responsibilities as a public official, he affirmatively acted on them in a manner that was injurious to this Department's reputation." Commissioner Martinez's opinion at 19. Her opinion and recommendation for dismissal were based on a careful application of the department's *Patrol Guide* § 104-1, p. 3, ¶ 2(b) ("Prohibited Conduct"). She methodically found that Mr. Pappas' conduct satisfied every element of the rule violation, *see* Commissioner Martinez's opinion at 14-18, and

that "there has been a sufficient showing of both actual and potential disruption of the Department's working relationships among its owns work force as well as its ability to function effectively in the multi-cultural environment of our city." *Id.* at 13. Pursuant to these findings and acting within department guidelines, she found Mr. Pappas guilty on two counts of disseminating defamatory material (14-20) and determined that his violations warranted dismissal. *Id.* at 20. Mr. Pappas has proffered no evidence suggesting that the police department had a hidden motive to punish him for his speech. Therefore, the defendants having demonstrated that there are no triable issues of fact pertaining to the three prongs of the *Jeffries* test, this Court finds that the Department's reasonable concern about potential disruption arising from Mr. Pappas' conduct outweighed any First Amendment protection that conduct enjoyed and, therefore, that defendant's dismissal of Mr. Pappas did not violate Mr. Pappas' First Amendment rights.[11]

CONCLUSION

Defendants' motion for summary judgment is hereby granted and plaintiff's cross-motion for summary judgment is denied.

IT IS SO ORDERED.

DATED: New York, N.Y.
October 25, 2000

NAOMI REICE BUCHWALD
UNITED STATES DISTRICT JUDGE

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[11]In light of the foregoing conclusions of law, it is unnecessary for this Court to reach the third argument raised by defendants, namely the individual defendants' personal involvement or entitlement to qualified immunity

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 13th day of November, two thousand two.

THOMAS PAPPAS,

Plaintiff-Appellant,

—v.—

Docket No. 00-9487

RUDOLPH GIULIANI, Mayor of the City of New York; HOWARD SAFIR, Commissioner of the Police Department of New York City,

Defendants-Appellees.

A petition for rehearing and rehearing en banc having been filed herein by the appellant Thomas Pappas.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is hereby **DENIED.**

It is further noted that the petition for rehearing en banc having been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

ROSEANN B. MacKECHNIE, Clerk

By: /s/ Arthur Heller
Arthur M. Heller
Administrative Attorney

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by /s/ Diedre Reed
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January 31, 2003

Mr. Christopher Dunn
125 Broad Street
17th Floor
New York, NY 10004

Re: Thomas Pappas v. Michael Bloomberg, Mayor, City of New York, et al.
Application No. 02A625

Dear Mr. Dunn:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Ginsburg, who on January 31, 2003, extended the time to and including March 28, 2003.

This letter has been sent to those designated on the attached notification list.

Sincerely,

WILLIAM K. SUTER, Clerk
By

Ruth Jones
Assistant Clerk

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Mr. Christopher Dunn
125 Broad Street
17th Floor, NY 10004

Mr. Leonard J. Koerner
New York City Law Department
100 Church Street
New York, NY 10007

Clerk
United States Court of Appeals for
the Second Circuit
1702 US Courthouse, Foley Square
New York, NY 10007

Supreme Court, U.S.
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2

No. 02-1441

IN THE
SUPREME COURT OF THE UNITED STATES

THOMAS PAPPAS,

Petitioner,

-against-

RUDOLPH GIULIANI, Mayor of the City of New York, HOWARD SAFIR, Commissioner of the Police Department of the City of New York, and THE CITY OF NEW YORK,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION

LEONARD J. KOERNER,*
EDWARD F.X. HART,
MARTA ROSS,
of Counsel.

MICHAEL A. CARDOZO,
Corporation Counsel of
the City of New York,
100 Church Street,
New York, New York 10007.
(212) 788-0847 or 1010

*Counsel of Record
May 30, 2003

COUNTER-QUESTION PRESENTED

Whether the United States Court of Appeals for the Second Circuit properly held that a municipal police department may, without violating the First Amendment's guarantee of free speech, terminate a police officer by reason of the officer's anonymous dissemination of bigoted racist materials?

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No. 02-1441

IN THE

SUPREME COURT OF THE UNITED STATES

THOMAS PAPPAS,

Petitioner,

-against-

RUDOLPH GIULIANI, Mayor of the City of New York, HOWARD SAFIR, Commissioner of the Police Department of the City of New York, and THE CITY OF NEW YORK,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION

COUNTER-STATEMENT OF THE CASE

Petitioner, a police officer formerly employed by the Police Department of the City of New York ("NYPD"), seeks to annul his termination on the basis that it was allegedly in retaliation for his exercise of protected speech

under the First Amendment. Respondents contend that petitioner's conduct does not implicate matters of public concern, but intends to express his own personal biases. Further, even if petitioner's actions could be characterized as speech implicating a matter of public concern, under the balancing test set forth in *Pickering v. Board of Education*, 391 U.S. 563 (1968), the potential for disruption reasonably presented by petitioner's speech far outweighed any expressive value of the speech.

A. Background

On at least two occasions in 1996 and 1997, petitioner, then a New York City police officer, mailed racist anti-African and anti-Semitic written materials to the Mineola Auxiliary Police Department in a return envelope that had been mailed out as part of that voluntary organization's solicitation campaign (48, 299-304).[1] Petitioner had engaged in approximately 200 similar mailings over the years in response to solicitations from other organizations (54-55).

The written materials mailed by petitioner consisted of various articles which the Mineola Auxiliary Police Department considered offensive "hate mail," such as, *inter alia*, articles referring to African Americans as the "Negro Wolf" and depicting African Americans as "uneducated, spear-wielding savages" (50, 300, 303). Other articles referred to Jewish people as part of "the Kosher Food Racket," denied the existence of the Holocaust, and included the display of swastikas (50, 301).

---

[1] Parenthetical references refer this Court to pages of the Joint Appendix, filed in the United States Court of Appeals for the Second Circuit, unless otherwise indicated.

The Nassau County Police Department investigated the source of these mailings by retaining the Honest Balloting Corporation, which traced the source of these offensive mailings to Petitioner (49). These mailings were ultimately referred to the Internal Affairs Bureau of the NYPD, which sent out its own solicitation mailings to petitioner's address, received defamatory articles from petitioner in return, and thereby confirmed that petitioner was the source of these mailings (50).

Petitioner admitted his participation in these mailing activities to the NYPD's Department Advocate's Office, and the NYPD subsequently issued against petitioner charges and specifications for his engaging in prohibited conduct regarding the dissemination of defamatory materials through the mails (48-49).

An administrative disciplinary trial was held on the disciplinary charges and specifications to determine what action, if any, the City would take with respect to petitioner's conduct (53). Petitioner testified at this trial and was cross-examined as to his reasons for mailing the materials (53-54). He indicated that the mailings were merely a form of protest resulting from his anger about being repeatedly solicited by charitable organizations; he testified that he hoped that his mailings would end the constant flow of solicitations by these organizations (53-54). He further stated that he did not intend to convey any particular message with regard to the contents of the articles sent in the mailings (53-54).

Petitioner explained that the motivation for his mailings were "just a hobby" and that he did not intend to offend, but acknowledged at the same time that some of the materials were inflammatory or defamatory towards persons of ethnic and other groups not his own (54, 55).

A 20-page decision, dated June 25, 1999, was rendered by the Assistant Deputy Commissioner of Trials, finding petitioner guilty of two Charges and Specifications regarding "Prohibited Conduct" and recommending petitioner's dismissal (47-67).

The Assistant Deputy Commissioner of Trials explicitly considered petitioner's First Amendment defense, but rejected it on the basis that (1) petitioner's conduct, by his own acknowledgement, did not constitute protected speech on a matter of public concern; and (2) even if it was protected speech, the potential for disruption in the NYPD outweighed any value of petitioner's "speech" (58). The Police Commissioner adopted the decision recommending Petitioner's termination on August 18, 1999 and petitioner was terminated from his employment (46).

Petitioner did not bring an Article 78 proceeding in state court seeking to challenge his termination within four months of the administrative trial judge's decision recommending termination or the Police Commissioner's ultimate determination to terminate his employment. Instead, petitioner brought the instant action in federal court by filing a complaint in January 2000, alleging that his termination from the NYPD constituted unlawful retaliation for protected speech under the First Amendment (363-69).

On or about May 19, 2000, respondents moved for summary judgment (41-304). On or about June 27, 2000, petitioner cross-moved for summary judgment (305-62).

B. The District Court's Order

By Opinion and Order dated October 25, 2000, the District Court (Buchwald, USDJ) granted respondents' motion for summary judgment, holding, *inter alia*, that

petitioner's conduct, to the degree it was expressive, did not bear on a matter of public concern, and, therefore, any disciplinary action taken on its account did not violate petitioner's constitutional First Amendment rights. *See* 118 F. Supp.2d 433 (S.D.N.Y. 2000).

Specifically, the District Court noted that petitioner intended to convey no message of "public concern" in his mailings to solicitors; "he simply wanted to dissuade charities from soliciting money from him by offending them with racist mailings." *Id.* at 445. The District Court further noted that "[i]n his initial interview with police investigators on March 24, 1998, petitioner suggested that his mailings were simply a 'hobby' with no purpose" and that "at his disciplinary hearing, he described his mailings as a form of 'protest' against 'being shaken down for money by the so-called charitable organizations,' and explained that he hoped the mailings would stop the organizations from soliciting him." *Id.* Thus, the District Court recognized that, "[b]y his own admission, [petitioner's] motive was to have his name removed from the mailing lists of solicitors." *Id.*

The District Court also explained that petitioner's choice of forum was relevant, even though speech need not be public to be protected as a matter of public concern:

> Mr. Pappas made no effort to forward his "protests" to the parties involved in the public debate and who represented the public interest, e.g., the Better Business Bureau, charitable oversight agencies, the IRS, the media, or the public at large. Rather, Mr. Pappas suggests that somehow, by anonymously sending his white supremacist literature to any charity with the

> misfortune of soliciting a donation from him, he was commenting on perennial matters of public concern such as taxation, political history, race and religion. This claim defies reason and the record. Although the First Amendment's protection does not turn on the effectiveness of a speaker's media strategy, Mr. Pappas' purported strategy for addressing a matter of public concern is so plainly unreasonable, it belies his claim that addressing matters of "public concern" was ever his intention.

Id. (citations omitted).

Assuming, *arguendo,* that petitioner could establish that his conduct amounted to speech of public concern, the District Court also held that the NYPD's interest in maintaining internal efficiency and collegiality outweighed any First Amendment protection to which petitioner's speech was entitled. Specifically, the District Court applied the *Pickering* balancing test to determine whether an employee's discharge for speech is constitutional. The District Court held, in pertinent part:

> On one side of the scale, we have [petitioner's] admittedly racist mailings. [petitioner's] racist tracts, sent randomly and anonymously to whichever organizations chanced to send him a mass-mailing solicitation, are at best entitled to a low level of First Amendment protection on the sliding Pickering scale. . . .
>
> On the other side of the scale, is the NYPD's concern about the potential disruption of having a known racist police

> officer on the force and in the media spotlight. The Supreme Court has long recognized that a police department has a substantial interest in developing "discipline, espirt de corps, and uniformity" within its ranks in order to fulfill its vital responsibility. . . . This substantial interest, in turn, gives police departments wide latitude in regulating the expressive activities of its officers in order 'to promote efficiency, foster loyalty and obedience to superior officers, maintain morale, and instill public confidence in the law enforcement institution'. . . .
>
> In the instant case, the police department had good reason to fear disruption in the force and the communities it served in reaction to [petitioner's] conduct. In view of the special latitude the Supreme Court has given police departments to discipline employees in light of the their essential mission, New York's recent problems with minority communities based on perceptions of police racism, the media coverage of [petitioner's] story, and the relatively low First Amendment value of [petitioner's] "public concern" speech, we find that there is no triable issue of fact concerning whether the potential for disruption outweighed the value of [petitioner's] speech.

Id. at 446-47 (citations omitted).

Further, the District Court noted that there was no evidence that the NYPD dismissed petitioner for the "content of his expression, as opposed to the potential for disruption in the aftermath of its discovery." *Id.* at 447. Specifically, the Court noted that the dismissal was based upon a careful application of the Patrol Guide and that there was a "'sufficient showing of both actual and potential disruption in the Department's working relationships among its own work force as well as its ability to function effectively in the multicultural environment of our city'" *Id.* at 448 (citing Commissioner Martinez' opinion at 13).

Thus, the District Court held that the NYPD's reasonable concern about the potential disruption arising from petitioner's conduct outweighed any First Amendment protection that conduct enjoyed, and, therefore, that respondents' dismissal of petitioner did not violate his First Amendment rights (39-40).

C. The Order of the Court of Appeals

On May 13, 2002, the United States Court of Appeals for the Second Circuit affirmed the District Court's order in a 2-1 decision. *See* 290 F.3d 143 (2d Cir. 2002). The Court held that, applying the *Pickering* balancing test, the police commissioner was entitled to terminate petitioner by reason of his public dissemination of his bigoted diatribes. Specifically, the Court concluded that petitioner was a public employee who disseminated his diatribes publicly, that he was venting his personal racial bias and that the making of such bigoted statements by a police officer had a very high capacity to impair the effective functioning of the NYPD in the discharge of its public mission and to provoke anger and discord among fellow police officers.

In explaining the *Pickering* balancing test, the Court of Appeals recognized that "[u]nder our Constitutional doctrines, few values are more carefully and thoroughly protected than the citizen's right to speak his mind on matters of public concern without interference by the government." *Id.* at 146. Nevertheless, the Court noted that this "right is not absolute" and that, "[a]t times, the right of free speech conflicts with other important government values, posing the problem of which interest should prevail." *Id.* The Court noted that the government employee's right of free speech is sometimes subordinated to the government employer's interest in its effective function. *Id.*

Applying the *Pickering* test, the Court held that:

> For a New York City police officer to disseminate leaflets that trumpet bigoted messages expressing hostility to Jews, ridiculing African Americans and attributing to them a criminal disposition to rape, robbery, and murder, tends to promote the view among New York's citizenry that those are the opinions of New York City police officers. The capacity of such statements to damage the effectiveness of the police department in the community is immense. Such statements also have a great capacity to cause harm within the ranks of the Police Department by promoting resentment, distrust and racial strife between fellow officers. In these circumstances, an individual police officer's right to express his personal opinions must yield to the public good. The restrictions of the First Amendment do not require the New York

> City Police Department to continue the employment of an officer whose dissemination of such racist messages so risks to harm the Department's performance of its mission.

Id. at 147.

The Court distinguished the instant case from *Rankin v. McPherson*, 483 US 378 (1987), relied upon by Judge Sotomayor in her dissenting opinion, by holding:

> This case is significantly different in several respects: (i) Pappas is a police officer, while the *Rankin* petitioner was a civilian clerical employee; (ii) Pappas disseminated his diatribes publicly while the *Rankin* petitioner was overheard speaking privately to a coworker; (iii) Pappas was venting his personal racial bias, while the *Rankin* petitioner (albeit in foolishly hyperbolic terms) was discussing the governmental policies of the President . . . (iv) furthermore, and most important, upon consideration of all the pertinent facts, while the *Rankin* petitioner's statement had little or no capacity to harm the effective functioning of the employer, the making of Pappas's statements by a police officer has a very high capacity to impair the effective functioning of the Police Department in the discharge of its public mission and to provoke anger and discord among fellow police officers.

Id. at 149 (citations omitted).

The Court rejected petitioner's argument that his statements had no capacity to impair the Department's effectiveness because he was assigned to computer work in the Management Systems Information Division rather than to law enforcement contact with the public, by holding:

> If Pappas were not a police officer but rather a civilian employee hired to work on the Department's computers, his case would have greater similarity to *Rankin*, and the capacity of his racist remarks to impair the Department's performance of its mission would be diminished. But Pappas is not a civilian employee. He is a cop. The fact that he was assigned to work on computers does not make him any less a cop, either in fact or in public perception. His assignment furthermore was subject to change; at any time he could have been assigned to a beat. If the press became aware of his dissemination of racist diatribes, it would report that this was done by a police officer – not that it was done by a person employed to work on Police Department computers. Furthermore, as to the capacity of Pappas's statements to cause racial tension and strife *among fellow police officers*, it would make no difference whether he was assigned to patrol a beat or to program computers.

Id. at 149-50.

The Court addressed Judge Sotomayor's reliance on this Court's holding in *Connick v. Myers*, 461 US 138 (1983), for the argument that petitioner's statements were made from his home, on his own time, and anonymously, in a manner that did not reveal that he was a police officer:

> To say that his statements would have had greater likelihood of causing harm if made in uniform or at work does not mean that they did not have a substantial capacity to cause harm as they were made. Where and when the statements are made is certainly a factor to be considered in the overall assessment, but it is only a factor. No talismanic or determinative significance attaches to it. What we must do in such cases is assess the entire picture – especially the likelihood that the employee's speech will harm the functioning of the governmental employer. Given the nature of Pappas's statements and their very high capacity to inflict serious harm on the employer's mission if it were discovered that they came from a police officer, the fact that Pappas acted anonymously, at home, and on his own time does not alter the ultimate conclusion that the Department was entitled to dismiss him because of the harm to the Department that his statements risked to inflict.

Finally, the Court addressed Judge Sotomayor's point that the NYPD should not have terminated petitioner because, absent its decision to discipline petitioner, no one would have known that these offensive materials were being distributed by a police officer. *Id.* at 150-51. In rejecting this argument as "seriously misguided as a policy matter" and "premised on a misunderstanding of the law," the Court held:

> First, as to the policy implications, we have little sympathy for the suggestion that the proper course for the Police Department,

upon learning that one of its officers was disseminating offensive racially bigoted materials, was to hush the matter up and hope to keep it secret. Had the Department taken this course and the truth had eventually become known, the harm to the Department would have been all the greater because the Department would have been perceived as tolerating Pappas's acts and being in passive complicity. While it may be true that the Department could have avoided adverse publicity had it covered up Pappas' misconduct rather than proceeding against him, that does not make it the right thing to do, and the Department did not lose the right, as Judge Sotomayor suggests, to dismiss Pappas for the misconduct merely because the bringing of the disciplinary action brought to public light the fact that it was a police officer who was responsible for the hate mailings.

Judge Sotomayor's argument is also premised on a misunderstanding of the government's burden under *Pickering*. A governmental employer's right to discharge an employee by reason of his speech in matters of public importance does not depend on the employer's having suffered *actual* harm resulting from the speech. The employee's speech must be of such nature that the government employee reasonably believes that it is likely to interfere with the performance of the employer's mission. The employer's interest in discharging the employee is demonstrated if the employee's

> statements create a significant risk of harm, regardless whether that harm actually materializes.

Id. at 151.

Accordingly, the Court, in balancing petitioner's interest in the right to pronounce his views against the NYPD's interest in promoting the efficiency of the public service it performs, concluded that the NYPD was entitled to terminate petitioner by reason of his public dissemination of his diatribes. *Id.* at 151.

Judge McMahon concurred, but wrote separately and agreed with the District Court that petitioner was engaged in "purely private speech." *Id.* at 152. Judge McMahon reasoned that the Court should focus on whether petitioner's speech was "calculated to redress personal grievances or whether it had a broader public purpose." *Id.* at 153. Judge McMahon concluded, in pertinent part, that petitioner was admittedly engaged in purely personal speech, even though the words he spoke touched upon matters of public importance, since at his departmental trial petitioner stated that his sole goal for disseminating his diatribes was to get his name excised from direct mail solicitation lists. *Id.* at 154.

In her dissenting opinion, Judge Sotomayor, although recognizing the substantial deference given to government employers in the law enforcement context, found, in pertinent part, that summary judgment was inappropriate because the majority set forth "too broad a rule regarding the government's ability to disqualify an individual from public employment based on the expression of an unpopular viewpoint." *Id.* at 158.

In an order dated November 13, 2002, the Court of Appeals denied petitioner's motion for a rehearing (A57-58).

REASONS FOR DENYING THE PETITION

Contrary to petitioner's contentions, the Court of Appeals' decision does not present novel and/or unresolved questions regarding governmental employees' First Amendment rights, nor does the decision present a conflict between the Second Circuit and the Fourth and Tenth Circuits. Rather, as shown below, the decision is based upon long-standing United States Supreme Court and Second Circuit precedent.

A. Matter of Public Concern

Petitioner attempts to "spin" the mailings he sent to various nonprofit organizations as constitutionally protected speech on matters of public concern based on the very contents of the mailings, whereas at his administrative trial he acknowledged that his mailings were merely a form of personal protest for receiving unwanted solicitations for donations, irrespective of the contents of what he included in his mailings and without any intent to convey a message by the contents of the mailings (53-55). Even if a recipient of petitioner's mailings could possibly have understood the message petitioner claims to have attempted to convey, such mailings, even if they were speech, do not amount to speech relating to a matter of public concern. *Connick v. Myers*, 461 U.S. 138 (1983); *Tindle v. Caudell*, 56 F.3d 966, 971 (8th Cir. 1995); *see also Pruitt v. Howard County Sheriff's Department*, 623 A.2d 696 (Md. Ct. Spec. App.), *cert. denied*, 630 A.2d 723 (1993).

In *Pruitt*, police officers engaged in a parody of the television program "Hogan's Heroes" by "uttering German

words and phrases, clicking their heels together, and raising their arms in Nazi-like salutes." The Maryland court concluded that the speech was private because it "did not contain any allegations of wrongdoing or present issues of public concern to the community." 623 A.2d at 701-702. As was the case in *Tindle*, the court in *Pruitt* found that the conduct at issue was unprotected because it did not address "a matter of public interest but instead indicated a personal bias." *Id.* The speech here is likewise a mere airing of bias, equally vacuous and equally unprotected. *See also Lawrenz v. James*, 852 F. Supp. 986, 991-92 (M.D. Fla. 1994), *aff'd*, 46 F.3d 70 (11th Cir. 1995) (upholding termination of prison guards wearing "White Power" t-shirts at an off-duty barbecue with other officers). The contents of petitioner's mailings here are clearly nothing more than expressions of petitioner's personal biases and of no concern to the community.

By petitioner's own testimony at his administrative trial, he had no intention of conveying any message to the general public by his mailings to organizations sending him solicitations; he merely sought to have these organizations stop sending him mailings as a matter of purely personal private interest (177-79, 184-85, 219-20, 222, 227, 229).[2] He also stated that he did not intend to start any trouble or

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[2] For example, petitioner has never indicated that he sought to publish the contents of his mailings or make it known to the public that he was sending mailings as a form of protest to the receipt of solicitations. The point of the so-called speech in question was not to convey a message to the public. *See Kokkinis v. Ivkovich*, 185 F.3d 840 (7th Cir. 1999) (stating that it is necessary to evaluate point of the speech in question to determine whether it constitutes a matter of public concern).

offend anyone by the contents of his own mailings (184, 229). Petitioner's personal annoyance with what he considers junk mail in his mailbox simply does not constitute a matter of public concern.

Accordingly, Judge McMahon correctly found that petitioner did not intend to speak on matters of public concern. Indeed, petitioner himself stated at his administrative trial that these mailings were part of "just a hobby" (55). As noted by Judge McMahon: "His own mouth condemneth him." 290 F.3d at 154. Thus, petitioner's First Amendment claim fails for this reason.

B. Application of the *Pickering* Balancing Test

Under *Waters v. Churchill*, 511 U.S. 661 (1994), a balancing test originally enunciated in *Pickering v. Board of Education*, 391 U.S. 563 (1968), is used to determine whether the First Amendment protects expression by a government employee from discipline by the employer. This Court stated in *Waters* (511 U.S. at 668):

> There is no dispute in this case about when speech by a government employee is protected by the First Amendment: To be protected, the speech must be on a matter of public concern, and the employee's interest in expressing herself on this matter must not be outweighed by any injury the speech could cause to "'the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.'" *Connick, supra*, 461 U.S. at 142 (quoting *Pickering v. Board of Ed. of Township High School Dist. 205, Will Cty.*, 391 U.S. 563, 568 (1968)). It is also agreed that it is the court's task to apply the

Connick test to the facts. *461 U.S. at 148, n. 7, and 150, n. 10.*

In restricting speech by its employees, the government as employer has far broader powers than does the government as sovereign. *Waters*, 511 U.S. at 671-72. "The First Amendment demands a tolerance of 'verbal tumult, discord, and even offensive utterance,' as 'necessary side effects of . . . the process of open debate,' *Cohen v. California*, 403 U.S. 15, 24-25 (1971). But we have never expressed doubt that a government employer may bar its employees from using Mr. Cohen's offensive utterance to members of the public or to the people with whom they work." *Waters, supra*, 511 U.S. at 672. This Court further stated (511 U.S. at 673):

> We have consistently given greater deference to government predictions of harm used to justify restriction of employee speech than to predictions of harm used to justify restrictions on the speech of the public at large. Few of the examples we have discussed involve tangible, present interference with the agency's operation. The danger in them is mostly speculative. . . . But we have given substantial weight to government employers' reasonable predictions of disruption, even when the speech involved is on a matter of public concern, and even though when the government is acting as sovereign our review of legislative predictions of harm is considerably less deferential.

Summarizing the balancing test, this Court stated (511 U.S. at 675):

> The key to First Amendment analysis of government employment decisions, then, is this: The government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer. The government cannot restrict the speech of the public at large just in the name of efficiency. But where the government is employing someone for the very purpose of effectively achieving its goals, such restrictions may well be appropriate.

As the Second Circuit Court of Appeals recently noted, in balancing the interests of the employer in providing effective and efficient public services with the public employee's interest in commenting on matters of public concern,

> a court must consider whether the statement sought to be protected impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationships . . . or interferes with the regular operation of the enterprise.

Moskowitz v. Coscette, __ F.3d __ (2d Cir.), 2001 U.S. App. LEXIS 813 (citing *Lewis v. Cowen*, 165 F.3d 154, 162 (2d Cir.), *cert. denied*, 528 U.S. 823 (1999)).

Petitioner herein has not properly applied the *Pickering* test. It is well established that the expressive value of the speech must be weighed against the government employer's reasonable belief in the *potential* for disruption, and that the government need not prove any

evidence of actual disruption. *See Waters, supra*; *Heil v. Santoro*, 147 F.3d 103 (2d Cir. 1998).[3]

On petitioner's side of the balancing scale, the First Amendment value of petitioner's speech is quite low. As the court in *Tindle* suggested, the lack of an intent on the part of the actor to communicate a message at the very least lessens the expressive attributes of the action. As the complaint in this case contains no hint of any message that petitioner intended to convey by his mailings, any inherently expressive content in petitioner's conduct is thoroughly diluted. *Tindle*, 56 F.3d at 970. The conduct involved in this case, *i.e.*, sending inflammatory hate mail to various groups, at best stands at the outer edge of the First Amendment's protections as low value speech, and is at the periphery of the "public concern" doctrine. Accordingly, under the *Pickering* and *Waters* balancing test, the protectible interest of this public safety employee in making the speech is minimal at best.

With respect to the Police Department, "on the other side of the scale is the likelihood of disruption to

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[3] The continuing viability of *Rankin v. McPherson*, 483 U.S. 378 (1987), which was decided by a slim majority of this Court, may be in some doubt following the subsequent decision in *Waters*. In any event, *Rankin* is distinguishable for a number of reasons discussed in the Court of Appeals' decision herein because in *Rankin* this Court found that a single, off-the-cuff remark to the petitioner's co-worker boyfriend could not be sufficiently disruptive to outweigh the employee's interest in the expressive value of the speech. Here, of course, petitioner engaged in a repeated pattern of controversial mailings that generated a criminal investigation and was newsworthy to the local media.

police operations and the protection of the strong interest police departments have in developing discipline, esprit de corps, and uniformity within its ranks so as to insure the safety of persons and property." *Heil v. Santoro*, 147 F.3d at 109; *Hughes v. Whitmer*, 714 F.2d 1407, 1419 (8th Cir. 1983), *cert. denied*, 465 U.S. 1023 (1984).

Discipline of public safety employees for off-duty expression of racist or ethnic hate messages has been sustained when there was a reasonable potential for disruption of the agency's work due to either or both internal dissension and damage to public perception of the agency's fairness in carrying out its duties. *See Weicherding v. Reigel*, 160 F.3d 1139 (7th Cir. 1998) (public participation in a Ku Klux Klan rally warranted termination of a prison guard. It could impair the perception of fairness by prison administrators in a racially charged environment where it was important to avoid racially motivated violence; guard posed a danger to the staff and he himself was at risk); *Tindle v. Caudell, supra*, 56 F.3d 966 (a police officer went to a Halloween party at a police lodge dressed in blackface, wearing bib overalls and a black, curly wig, and carrying a watermelon. A 30-day suspension for the officer was sustained against First Amendment challenge. The party had been attended by other officers and their guests, several African-American members of the police force were offended by the petitioner's appearance at the party, and the department already was concerned about racial divisions within the force and had undertaken programs to remedy the problem. The Court held that this appearance at a private party did not implicate a matter of public concern. However, even if it did, the *Pickering* balance weighed heavily in favor of the police, given the need to maintain harmony in this paramilitary organization charged with maintaining public safety and order, which thereby is given more latitude in

their decisions regarding discipline than an ordinary government employer); *Lawrenz v. James*, 852 F. Supp. 986 (M.D. Fla 1994), *aff'd*, 46 F.3d 70 (11th Cir. 1995) (petitioner, a correction officer, wore a "White Power" T-shirt adorned with a swastika at a barbecue to which the police were eventually called due to someone firing a rifle. Petitioner told the police he was wearing the "White Power" T-shirt to commemorate Martin Luther King Day. This incident received local press coverage. Petitioner's termination from employment was upheld. The wearing of the T-shirt by petitioner and the discussion of his views on race relations did not involve a matter of public concern, but even if it did, the *Pickering* balance tilted strongly in favor of the Department, given the potentially adverse reaction that may arise from employment of a correction officer with such views. The Department did not have to wait until racial tensions actually erupted before taking action).

Here, the Second Circuit properly found that the interest of the City in preventing both internal and external disruption is extraordinarily weighty. *See* 290 F.3d at 146-48. As an employer, the NYPD is entitled to maintain discipline, instill public confidence in public safety agencies, and ensure harmony as necessary to the operation and mission of its agency. *See Gilbert v. Homar*, 520 U.S. 924, 932 (1997). The potential for disruption is extensive here, as any toleration of petitioner's defamatory conduct would undermine public confidence in the NYPD.

The very fact that the media found petitioner's conduct newsworthy indicates that some disruption has already occurred. In *McMullen v. Carson*, 754 F.2d 936 (11th Cir. 1985), a clerical employee in a law enforcement office was terminated after his membership in the Ku Klux Klan was brought to the public's attention via the media.

The employee's First Amendment retaliation claim was dismissed in that case because of the potential for disruption in the law enforcement context. Here, too, a police officer performing primarily non-law enforcement duties has engaged in conduct that brings discredit and disruption on a law enforcement agency. The instant case is virtually indistinguishable from *McMullen*.

Moreover, in light of all of the media attention devoted to the NYPD's contacts with the minority community, it is incredible to believe that the NYPD's belief in a potential for disruption is unreasonable when one of its own officers expresses overtly racist views, whether symbolically through racist and anti-Semitic mailings or through his own utterances. Petitioner can only state in a conclusory way that no disruption occurred, but courts have repeatedly recognized that where the very potential for disruption is apparent from the employee's speech itself, a municipality need not continue to employ that individual. *See Lewis v. Cowen*, 165 F.3d at 165 ("This is the classic case of an employee 'who is paid a salary so that he will contribute to an agency's effective operation but who begins to do or say things that detract from the agency's effective operation.'" [citing *Waters v. Churchill*, 511 U.S. at 675]); *Lumpkin v. Brown*, 109 F.3d 1498, 1500-01 (9th Cir.), *cert. denied*, 522 U.S. 995 (1997) (removal of San Francisco City Commissioner of Human Rights for speeches condemning homosexuality did not violate the First Amendment; "the City has not only a legitimate but a heightened expectation that its Human Rights Commissioners refrain from speaking in a way that mocks the City's anti-discrimination policy"); *Sims v. Metropolitan Dade County*, 972 F.2d 1230, 1237 (11th Cir. 1992) (black male employee of Miami Department of Community Affairs properly disciplined for anti-Hispanic statements; the "First Amendment does not require that

[petitioner] be allowed to continue his weekday employment drenching the fires of racial animosity for the Department while he fans those flames during his weekend sermons").

As set forth below, there has even been civil unrest due to a lack of confidence by some members of the polity in the NYPD. That indispensable trust between the police and polity, which has already been in substantial tension, has been imperiled by petitioner's actions. The millions of dollars and the mandatory nature of the CPR program, as well as its wide publicity (for example, the words "Courtesy, Professionalism and Respect" have been painted on many police cars as a constant reminder to both police and public), show that this concern is not a post-hoc rationalization in the case at bar. Policing is also a cooperative effort between police officers. Those cooperative bonds have been damaged by petitioner's defamatory actions. *See Tindle*, 56 F.3d at 971; *Crain v. Board of Police Commissioners*, 920 F.2d 1402, 1409 (8th Cir. 1990).

This City has had repeated public disturbances protesting alleged police misconduct. From Howard Beach Queens, to Crown Heights, Brooklyn, to Washington Heights, Manhattan, police conduct has been under the most intense scrutiny and, unfortunately, some members of the public are all too ready to believe the worst of their police. The potential for such disturbances is intensified by the acts of this petitioner. Another source of disruption stemming from this incident is that petitioner's motives will now be suspect in any questionable exchange between him and a member of a minority group, whether with fellow employees at work or those in the general public in the

community.[4] The City cannot repose trust in petitioner's reliability and judgment after he has so conspicuously displayed such a lack of judgment.

It need only be added that numerous federal courts have recognized in the context of § 1983 First Amendment litigation that "deference to the employer's judgment regarding the disruptive nature of an employee's speech is especially important in the context of law enforcement." *Kokkinis*, 185 F.3d at 845; *Tindle, supra*. Morale and confidence in the NYPD is simply not served by the retention of employees who engage in conduct like petitioner's.

Accordingly, the Second Circuit's analysis of the *Pickering* balancing scale falls decisively in favor of respondents.

C. There is No Split Between the Second Circuit and the Fourth and Tenth Circuits.

Contrary to petitioner's assertions, there is no conflict between the Second Circuit's decision herein and the Fourth Circuit's decision in *Berger v. Battaglia*, 779 F.2d 992 (4th Cir. 1985), and the Tenth Circuit's decision in *Flanagan v. Munger*, 890 F.2d 1557 (10th Cir. 1989), because crucial factual differences exist which render the Fourth and Tenth Circuit decisions readily distinguishable.

At the outset, it is important to emphasize that, as discussed supra, pp. 15-17, petitioner's anonymous dissemination of offensive mailings had the sole goal of

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[4] In fact, petitioner was once reprimanded for insensitive remarks towards an African-American employee in the Department (55).

getting his name excised from direct mail solicitation lists. As Judge McMahon noted, petitioner was admittedly engaged in pure personal speech, which he so stated at his disciplinary hearing when it mattered most: "His own mouth condemneth him." 290 F.3d at 154.

To the contrary, the *Berger* plaintiff's Al Jolson impersonation act constituted speech upon a matter of obvious public interest to those segments of the community who willingly attended them and sometimes paid to see plaintiff's act. *Berger*, 779 F.2d at 999. Moreover, the *Flanagan* court found that the plaintiffs' rental of sexually explicit videos from their video rental store constituted "protected expression." *Flanagan,* 890 F.2d at 1565.

Moreover, the application of the *Pickering* balancing test presents significant distinctions between the instant case and the *Berger* and *Flanagan* decisions. In *Berger*, plaintiff, who performed in blackface and entertained hundreds of people, including members of the Police Department, was referred to by the Deputy Commissioner as "the Department's Al Jolson." 779 F.2d at 994. The Department was aware of plaintiff's musical act, including his Al Jolson impersonation, for at least 4 years before plaintiff's act became the source of public disruption as a result of the NAACP's public protest to his act. *Id.* at 994-96. The Department conceded that there had not been any disruption or potential disruption of the Department's internal operations as a result of plaintiff's performances in blackface. *Id.* at 996.

The Fourth Circuit held that plaintiff's conduct in performing public entertainment in blackface was constitutionally protected speech in that it outweighed the Police Department's countervailing interest in avoiding future disruptions both of its resources and harmonious

relationships with the black community. *Id.* at 1002. The Circuit specifically held that "the perceived threat of disruption *only to external operations and relationships*" was "caused not by the speech itself but by the threatened reaction to it by offended segments of the public." *Id.* at 1001 (emphasis added).

Similarly, the Tenth Circuit in *Flanagan* noted that the police department did not argue that plaintiffs' speech had any detrimental impact on working relationships within the department or interfered with its regular operation. 890 F.2d at 1566. As in *Berger,* the Court noted that the defendants' concern involved the reaction by offended members of the public and its adverse impact on external relationships and operations. *Id.*

The Second Circuit's decision herein is not a threat to the First Amendment in the form of a "heckler's veto," as the courts found in *Berger* and *Flanagan.* 779 F.2d at 1001, 890 F.2d at 1566. To the contrary, the NYPD's concern involved to a large extent the potential internal disruption of having a known racist police officer on the force and in the media spotlight. Indeed, the Second Circuit recognized that petitioner's statements had a "great capacity to cause harm within the ranks of the Police Department by promoting resentment, distrust and racial strife between fellow officers." 290 F.3d at 147. The NYPD's concern is consistent with this Court's recognition of a police department's substantial interest in developing "discipline, esprit de corps, and uniformity" within its ranks in order to fulfill its vital public mission. *Kelley v. Johnson,* 425 U.S. 238, 246 (1976). Therefore, the Second Circuit properly concluded that the NYPD had good reason to fear disruption in the force and the communities it serves in reaction to petitioner's conduct.

Accordingly, it is clear that there is no conflict between the Second Circuit's decision herein and those of the Fourth and Tenth Circuits. Absent any conflict and for the additional reasons presented above, the City respectfully requests that this Court deny the petition for a writ of certiorari.

CONCLUSION

For the reasons set forth, the City respectfully asks this Court to deny the petition for a writ of certiorari.

MICHAEL A. CARDOZO,
Corporation Counsel of the
City of New York,
Attorney for Respondents,
100 Church Street,
New York, New York 10007.

LEONARD J. KOERNER, *
EDWARD F.X. HART,
MARTA ROSS,
of Counsel.

*Counsel of Record
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(3)

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No. 02-1441

IN THE

Supreme Court of the United States

THOMAS PAPPAS,

Petitioner,

—v.—

RUDOLPH GIULIANI, Mayor of the City of New York; HOWARD SAFIR, Commissioner of the Police Department of the City of New York; and the CITY OF NEW YORK,

Respondents.

ON PETITION FOR A WRIT OF *CERTIORARI*
TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY TO BRIEF IN OPPOSITION TO PETITION

Of Counsel:

Rosemary Carroll
Alan Friess
CARROLL & FRIESS
20 Thomas Street
New York, New York 10007
(212) 608-0500

Christopher T. Dunn
Counsel of Record
Arthur N. Eisenberg
NEW YORK CIVIL LIBERTIES
UNION FOUNDATION
125 Broad Street, 17th Floor
New York, New York 10004
(212) 344-3005

Counsel for Petitioner

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RUDOLPH GIULIANI, Mayor of the City of New York; HOWARD SAFIR, Commissioner of the Police Department of New York City; and the CITY OF NEW YORK,

Respondents.

REPLY TO BRIEF IN OPPOSITION TO PETITION

In their Brief in Opposition the respondents contend that the Court should not grant a writ of *certiorari* in this matter because, according to the respondents, the petitioner's expressive activity did not bear on a matter of "public concern" within the meaning of *Pickering v. Board of Education* and its progeny. Because this contention rests on a fundamental misunderstanding of the *Pickering* doctrine, the petitioner files

this short reply.[1]

THE "PUBLIC CONCERN" EXCEPTION TO THE *PICKERING* DOCTRINE PERTAINS TO PERSONAL EMPLOYMENT GRIEVANCES AND HAS NO BEARING ON PUBLIC-EMPLOYEE SPEECH UNRELATED TO THE WORKPLACE.

The respondents assert that the petitioner's mailings, "even if they were speech, do not amount to speech on a matter of a matter of public concern." Respondents' Opposition at 15. More specifically, the respondents contend that the record in this matter establishes that when the petitioner mailed political materials from his home to various organizations "he had no intention of conveying any message to the general public; he merely sought to have these organizations stop sending him mailings as a matter of personal, private interest." *Id.* at 16.

At the outset, any suggestion that Mr. Pappas's mailing of political materials is not entitled to protection under the *Pickering* doctrine because he did not seek to convey a message to the "general public" is foreclosed by the Court's decision in *Givhan v. Western Line Consolidated School District.* There the Court squarely rejected the proposition "that a public employee forfeits his protection against governmental abridgement of freedom of speech if he decides to express his views privately rather than publicly." 439 U.S. 410, 414 (1979) (holding that *Pickering* protections extended to private

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[1]The respondents offer additional arguments in their opposition, but these matters are covered sufficiently in the Petition so as not to justify further discussion.

communications between school teacher and principal).

Beyond the issue of the public nature of the expression, the respondents rely on what they deem to be the "personal" motivation behind the petitioner's expressive activity. According to the respondents, core expressive activity such as the mailing of political materials can be disqualified from being speech on a matter of "public concern," as that concept is used in the *Pickering* doctrine, if the speaker acts out of "personal" motives. This suggestion, as the respondents note in their brief, draws some support from a handful of lower court decisions. *See* Respondents' Brief in Opposition at 15-17.[2]

It does not, however, draw any support from the decisions of this Court. To the contrary, the respondents' position fundamentally misconstrues this Court's formulation of the "public concern" component of the *Pickering* doctrine, and , if accepted, would significantly erode even further the First Amendment rights of public employees.

In assessing the respondents' position, it is important to recognize first that the "public concern" component of the *Pickering* doctrine represents a further reduction in the free-

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[2]Though the Second Circuit decision ruling against Mr. Pappas in this matter did not turn on a determination that the speech at issue here was not on a matter of public concern, *see* A5-6 (identifying relevant legal standards and assuming without deciding that speech was on a matter of public concern); *see also* A21-23 (dissenting opinion by Judge Sotomayor finding speech on a matter of public concern), the concurring opinion did take the position advanced by the respondents in their opposition, *see* A15-20 (McMahon, D.J., concurring).

speech protections afforded public employees. Under the *Pickering* doctrine, speech that does not qualify as speech on a matter of "public concern" does not qualify for even the reduced *Pickering* protections. *See Connick v. Myers*, 461 U.S. 138, 146-47 (1983). Given this, the broader the category of employee speech that can be said not to be on a matter of public concern, the greater the speech that is unprotected.

In light of the "public concern" component's role in the *Pickering* analysis, the Court has described speech not on a matter of "public concern" narrowly to encompass only that speech pertaining to a public employee's personal employment or to some particular aspect of the public employer's workplace that is unrelated to public concerns. Thus, in the one *Pickering* case in which it has found speech not to be on a matter of "public concern," the Court in *Connick* held that most of an office survey distributed by an assistant district attorney did not qualify for protection under even the *Pickering* doctrine. *See* 461 U.S. at 147-48. In doing so, the Court explained the "public concern" test in the following terms:

> We hold only that when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by the public agency allegedly in reaction to the employee's behavior. Our responsibility is to ensure that citizens are not deprived of fundamental rights by virtue of working for the government; this does not require a grant of immunity for employee grievances not afforded

by the First Amendment to those who do not work for the State.

461 U.S. at 147 (emphasis supplied).

Thus, the public-employee speech exempt from even the reduced protections of the *Pickering* doctrine is that speech amounting to "employee grievances." The Court has never suggested that public-employee speech undertaken outside the workplace and having nothing to do with the workplace is subject to the "public concern" inquiry.

The speech at issue in this case indisputably did not concern any employment grievance on the part of Mr. Pappas. Indeed, his speech was wholly unrelated to the workplace. The "public concern" component of the *Pickering* doctrine simply is irrelevant in a case such as this.

To accept the respondents' position would be to unmoor the *Pickering* doctrine from its basic premise: that the government can punish speech related to the workplace because in those circumstances the government is acting as employer rather than sovereign. Consistent with this premise, an employment grievance is the type of speech that most implicates the government's interest as employer, and the speaker's motive may be relevant to determining whether the speech is intended to advance a personal employment concern rather than address a matter of "public concern."

This type of motive inquiry makes no sense, however, in the context of speech unrelated to the workplace. Just as one would not one inquire into the specific motive of a public employee fired for participating in a public parade, no inquiry should be undertaken into the motive of Mr. Pappas for his core expressive activity -- the mailing of political materials -- to make the threshold determination whether that activity was

protected by the First Amendment.[3] The motive for core expressive activity unrelated to the workplace is irrelevant to the *Pickering* analysis and provides no basis for denying a writ of *certiorari* in this matter.

CONCLUSION

For all the foregoing reasons and for the reasons set out in the Petition, the petitioner urges the Court to grant a writ of *certiorari* in this matter.

Respectfully submitted,

Christopher T. Dunn
(Counsel of Record)
Arthur N. Eisenberg
New York Civil Liberties
Union Foundation
125 Broad Street
New York, New York 10004
(212) 344-3005

Of Counsel
Rosemary Carroll
Alan Friess
Carroll & Friess
20 Thomas Street
New York, N.Y. 10007
(212) 608-0500

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[3]This is not a case of "expressive conduct," for which motive is relevant for determining whether the conduct is protected by the First Amendment. *See, e.g. Texas v. Johnson*, 491 U.S. 397, 404-05 (1989) (holding that burning of flag constituted protected expressive conduct).